BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON

IN THE MATTER OF U. S. WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238

DECISION NO. 66201

OPINION AND ORDER

Open Meeting
August 21, 2003
Phoenix, Arizona

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 ("1996 Act") added Section 271 to the Communications Act of 1934. The purpose of Section 271 is to specify the conditions that must be met in order for the Federal Communications Commission ("FCC") to allow a Bell Operating Company ("BOC"), such as Qwest Corporation ("Qwest" or the "Company"), formerly known as US WEST Communications, Inc. ("US WEST")[1] to provide in-region interLATA services. The conditions described in Section 271 are intended to determine the extent to which local phone service is open to competition.

2. Section 271 (c)(2)(B) sets forth a fourteen point competitive checklist which specifies the access and interconnection a BOC must provide to other telecommunications carriers in order to satisfy the requirements of Section 271. Section 271 (d)(2)(B) requires the FCC to consult with State commissions with respect to the BOC's compliance with the competitive checklist. Also, Subsection (d)(2)(A) requires the FCC to consult with the United States Department of Justice.

[1] For purposes of this Order, all references to US WEST have been changed to Qwest.

3. To implement its checklist requirements, Qwest has proposed its Statement of Generally Available Terms and Conditions ("SGAT"). The SGAT sets the terms, conditions and pricing under which Qwest will offer and provide network Interconnection, access to UNEs, ancillary services and Telecommunications services available for resale to any requesting CLEC. CLECs can adopt the SGAT in lieu of entering into individually negotiated interconnection agreements. The SGAT includes General Terms, a Bona Fide Request ("BFR") Process and Special Request Process ("SRP"). Section 271 requires a finding that the General Terms and Conditions, BFR and SRP components of an SGAT comply with the competitive checklist requirements.

4. In Decision No. 60218 (May 27, 1997) this Commission established a process by which Qwest would submit information to the Commission for review and a recommendation to the FCC whether Qwest meets the requirements of Section 271 of the 1996 Act.

5. On February 8, 1999, Qwest filed a Notice of Intent to File with the FCC and Application for Verification of Section 271(c) Compliance ("Application"), and a Motion for Immediate Implementation of Procedural Order. On February 16, 1999, AT&T Communications of the Mountain States, Inc. ("AT&T"), GST Telecom, Inc. ("GST"), Sprint Communications Company, L.P. ("Sprint"), Electric Lightwave, Inc. ("ELI"), MCI Worldcom, Inc., on behalf of its regulated subsidiaries ("WorldCom"), and e-spire Comunications, Inc. ("e-spire") filed a Motion to Reject Qwest's Application and Response to Qwest's Motion.

6. On March 2, 1999, Qwest's Application was determined to be insufficient and not in compliance with Decision No. 60218. The Application was held in abeyance pending supplementation with the Company's Direct Testimony, which was ordered pursuant to Decision No. 60218 and the June 16, 1998 Procedural Order. On March 25, 1999, Qwest filed its supplementation.

7. By Procedural Order dated October 1, 1999, the Commission bifurcated operational Support System ("OSS") related Checklist Elements from non-OSS related Elements.

8. In its December 8, 1999 Procedural Order, the Commission instituted a collaborative workshop process to evaluate the non-OSS Checklist Items. The December 8, 1999 Procedural Order directed Staff to file draft proposed Findings of Fact and Conclusions of Law for review by the parties within 20 days of each Checklist Item being addressed. Within ten days after Staff filed its draft

findings, the parties are to file any proposed additional or revised findings and conclusions. Staff has an additional ten days to issue its Final Recommended Report.

9. For "undisputed" Checklist Items, the Commission Staff was directed to submit its Report directly to the Commission for consideration at an Open Meeting. For "disputed" Checklist Items, Commission Staff submits its Report to the Hearing Division, with a procedural recommendation for resolving the dispute.

10. On May 30, 2001, a Workshop on General Terms and Conditions, BFR and SRP took place at Hewlett-Packard's facilities in Phoenix. Parties appearing at the Workshop included Qwest, AT&T, WorldCom, Covad, Sprint, and Commission Staff and its consultants, Qwest relied on affidavits filed April 4, 2001, May 11, 2001 and May 15, 2001. AT&T filed comments on May 4, and 25, 2001. WorldCom filed comments on May 3 and May 25, 2001. Covad filed comments on May 3 and May 24, 2001.

11. A second Workshop convened on June 13, 2001.

12. At the conclusion of the Workshops, the parties were unable to reach agreement on a number of issues. Qwest filed its Brief on Impasse issues on September 19, 2001 and an Errata to its Brief on September 26, 2001. AT&T filed its Brief on September 19, 2001.

13. On December 27, 2001, Staff filed its Proposed Findings of Fact and Conclusions of Law ("Proposed Findings").

14. On January 14, 2002, WorldCom and Qwest filed Comments on Staff's Proposed findings.

15. On January 16, 2001, AT&T filed Comments on Staff's Proposed Findings.

16. On March 25, 2002, Staff filed its Final Findings of Fact and Conclusions of Law on Qwest's SGAT Section 5: General Terms and Conditions, BFR and Forecasting ("Final Report"). A copy of Staff's Final Report is attached hereto as Exhibit A and incorporated herein by reference.

17. On April 5, 2002, Qwest filed Comments on the Final Report.

18. On April 10, 2002, AT&T filed Comments on the Final Report.

19. On May 15, 2002, Staff filed a Response to Qwest's Comments on the Final Report.

. . .

DISPUTED ISSUE NO. 1 – Should the rates, terms and conditions for new products be substantially the same as the rates, terms and conditions for comparable products and service that are contained in the SGAT?

20. The CLECs propose that during the interim period between product rollout and before Commission approval, Qwest apply the rates, terms and conditions of its current products that most closely resemble the new product to the interim offering. AT&T proposed the following as SGAT Section 1.7.2:

> Qwest agrees that the rates, terms and conditions applicable to new products and services that are not contained in this SGAT shall be substantially the same as the rates, terms and conditions for comparable products and services that are contained in this SGAT. Qwest shall have the burden of demonstrating that new products and services are not comparable to products and services already contained in this SGAT.

21. Qwest argues that the SGAT already contains sufficient safeguards against unreasonable rates, terms and conditions, and that the Commission will insure that any rates, terms and conditions are reasonable. SGAT Section 5.1.6 provides that Qwest will offer products and services in accordance with laws and regulations. Qwest argues that AT&T's proposed Section 1.7.2 is confusing and will add an additional layer of analysis addressing comparable rates, instead of allowing the analysis to focus on what the appropriate rates should be. Qwest also argues that it has the right to establish contractual rates, terms and conditions without first agreeing how Qwest will make it available to or how CLECs will use and pay for it.

22. While Staff agrees with CLECs that the current process for CLECs to purchase new products and services is lengthy and cumbersome, Staff did not believe that the CLECs' proposal would abbreviate the process. Staff recommends accepting Qwest's current SGAT language on the condition that the Commission finds that Qwest's revised Co-provider Change Management Process ("CICMP") process streamlines the process for new products and a confirmation that it resolves CLEC concerns. Staff further recommends that Qwest revise its SGAT and Interim Advice Adoption Letter for Arizona to indicate that the Qwest rates are interim and subject to true-up once the Commission reviews Qwest's rates and cost support and determines whether they are reasonable.

23. In its April 5, 2002 Comments to the Final Report, Qwest states that Staff's recommendation that Qwest should revise its SGAT to indicate its rates are interim and subject to

true-up is redundant and unnecessary. Qwest states that SGAT Section 1.7.1.2 states that "CLEC agrees to abide by [Qwest's proposed] terms and conditions on an interim basis," and also provides for a "true-up."

24. In response, Staff notes that SGAT Section 1.7.1.2 is limited to instances in which the CLEC desires to negotiate an amendment with different terms and conditions than offered by Qwest. Staff does not believe that this language goes far enough. Staff states that Qwest is required to file all new rates, terms and conditions to its SGAT with the Commission for review and approval. If the Commission determines that Qwest's rates are too high and are not TELRIC compliant, all CLECs, even those initially agreeing to Qwest's rates and terms should receive the benefit of the Commission's ruling. Staff also finds it problematic that Section 1.7.1.1 states that the interim advice letter will be filed with the Commission for approval, but says nothing about the SGAT revision being filed with the Commission for approval. It is Staff's position that Qwest must file all changes to its SGAT including any new rates, terms and conditions, with the Commission for approval. Staff believes the SGAT should reflect this obligation.

25. The CLECs are concerned that new products are available to them as quickly as possible. We believe that we can best evaluate this issue in connection with our review of the Change Management Process ("CMP"). Our finding of whether Qwest's SGAT's General Terms, BFR and SRP meet the requirements of Section 271 of the 1996 Act depend in part on our approval of Qwest's CMP. It appears that SGAT Section 1.7.1.2 addresses Staff's concern that in the case when a CLEC wants to negotiate the terms of the new product, that the rates are interim and subject to true-up. Section 1.7.1.1, however, applies to those situations where the CLEC agrees to Qwest's rates and terms for a new product that has not yet received Commission approval. Section 1.7.1.1 does not indicate the terms are interim and subject to true-up. The parties cannot by their agreement, usurp the Commission's role of setting just and reasonable rates. Until the Commission approves rates for new products, the rates, terms and conditions are interim, and should be subject to true-up. Thus, Qwest should revise the SGAT and its Advice Adoption letter (Exhibit L) to indicate that it must file all changes to its SGAT, including new rates, terms and conditions, with the Commission for approval and that until approved, the rates are interim and subject to true-up.

DISPUTED ISSUE NO. 2: Should aggregated forecasts be treated as confidential?

26. The CLECs take issue with Qwest's policy that aggregate forecasts are not confidential.

27. Qwest argues that data can only be considered confidential, proprietary, or competitively sensitive to individual CLECs if the data can be linked to the CLEC as opposed to aggregated data that does not lend itself to make that link. Qwest has agreed under new SGAT Section 5.16.9.1.1 that in situations where the aggregated data could be linked to an individual CLEC, Qwest would not disclose aggregated data "if such disclosure would, by its nature, reveal individual CLEC information."

28. Staff agrees with the CLECs that except as required to disclose by law or regulation, Qwest should not disclose aggregate CLEC forecast information, unless the CLECs consent to the disclosure. Staff recommends adopting the following language for SGAT Section 5.16.9.1.1:

> Upon the specific order of the Commission, Qwest shall provide the forecast information that CLECs have made available to Qwest under this SGAT, under seal. Qwest shall take any actions necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures, Qwest shall provide notice to all CLECs involved at least 5 business days prior to the release of the information.

Staff also recommends the following language replace language in SGAT Section 5.16.9.1[2]:

> Qwest's legal personnel in connection with their representation of Qwest in any dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under this SGAT.

29. Staff's recommended SGAT language resolves this dispute in a reasonable manner, and should be adopted. Qwest's March 29, 2002, SGAT reflects Staff's proposed changes. No further action is necessary at this time.

DISPUTED ISSUE NO. 3: What is the appropriate scope of indemnification within the SGAT?

30. Qwest's SGAT Section 5.9.1 provides:

[2] Staff's proposed language replaces language that read "legal personnel if a legal issue arises about the forecast".

5.9.1 The Parties agree that unless otherwise specifically set forth in this Agreement the following constitute the sole indemnification obligations between and among the Parties:

5.9.1.1 Each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an indemnity) from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (including attorneys' fees), whether suffered, made, instituted, or asserted by any Person or entity, for invasion or privacy, bodily injury or death of any Person or Persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, resulting from the Indemnifying Party's breach of or failure to perform under this Agreement, regardless of the form or action, whether in contract warranty, strict liability or tort including (without limitation) negligence of any kind.

5.9.1.2 In the case of claims or loss or incurred by an End User Customer of either Party arising out of or in connection with services provided to the End User Customer by the Party, the Party whose End User Customer alleged or incurred such claims or loss (the Indemnifying Party) shall defend and indemnify the other Party and each of its officers, directors, employees and agents (collectively the Indemnified Party) against any and all such claims or loss by the Indemnifying Party, End User Customers regardless of whether the underlying service was provided or Unbundled Element was provisioned by the Indemnified Party, unless the loss was caused by the willful misconduct of the Indemnified Party.

31. The CLECs believe that Qwest's proposed indemnity clauses are too narrow and the liability too limited. AT&T and WorldCom proposed that SGAT Section 5.9.1.1 be expanded to include indemnification for Acts or Omissions, in addition to contract breaches, and to make Qwest liable to CLECs for end-user customer retail service quality penalties.

32. Qwest believes that its current provision incorporate reasonable reciprocal indemnity rights and obligations. Qwest asserts it has incorporated a number of changes to the indemnification process at AT&T's request. SGAT Section 5.9.1.1, as limited by Section 5.9.1.2, only applies to claims brought by persons or entities that are not end users of either party. As to such strangers to both parties, Qwest proposes that contractual indemnification rights would apply only if there is some nexus to the agreement between Qwest and the CLEC. Qwest states that because there are thousands

of scenarios under which one party could legally be obligated to indemnify the other at law, they should be contractually obligated to indemnify each other for claims of third parties other than end-users only where the underlying conduct bears some connection with the party's breach or failure to perform under the agreement. Qwest also argues that each party should contractually indemnify the other for all claims brought by a Party's end user. Without the end-user indemnification provision in Section 5.9.1.2, Qwest argues, a CLEC may choose to offer terms not to exclude liability for consequential damages, and then attempt to pass through any resulting liability damages to Qwest.

33. Qwest argues the CLECs' concerns regarding retail service quality payments, penalties or fines are misplaced because the CLECs are not subject to these fines and the Performance Assurance Plan sufficiently compensates the CLECs for Qwest performance.

34. Qwest has agreed to incorporate language from the multi-state facilitator's report. The multi-state facilitator recommended the following be included at the end of Section 5.9.1.2:

> The obligation to indemnify with respect to claims of the Indemnifying Party's end users shall not extend to any claims for physical bodily injury or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnified party.

35. Staff recommends adopting Qwest's proposed language with the additions proposed by the multi-state facilitator.

36. CLECs are not subject to retail service quality penalties. Their argument that Qwest should indemnify them for penalties they don't incur is misplaced. We find that Qwest's proposed language, with the multi-state facilitator's additions, is reasonable and appropriate for the SGAT. Qwest should revise its SGAT to incorporate the multi-state facilitator's additional language.

DISPUTED ISSUE NO. 4: Bona Fide Request Process (BFR), Special Request Process (SRP) and Individual Contract Basis (ICB). A) Should Qwest provide notice of substantially similar BFRs? B) When should Qwest "productize" BFRs and c) Should Qwest expand the SRP beyond certain UNE and UNE Combinations ("UNE-Cs")?

37. The CLECs argue that the BFR process suffers from lack of information and clarity. They are concerned with having to rely on Qwest to determine whether a similar BFR has been granted or denied. The CLECs want Qwest to provide notice of similar BFRs to reduce the time and expense of preparing the BFR.

38. CLECs also charge that Qwest has no process for determining when it should create a product offering of substantially similar BFRs or when and if it will ever submit its terms, conditions and prices for any given BFR to any Commission for approval. The CLECs contend that if a product is technically feasible within Qwest's network, a technically feasible type of interconnection has been created and should be made available to all CLECs on a standardized basis.

39. Exhibit F to the SGAT appears to limit the services that CLECs may request through the SRP to certain UNE combinations. CLECs argue the SRP should be expanded to include interconnection, collocation and all other obligations that Qwest must meet if a standard product has not been provided.

40. The CLECs further argue that Qwest does not provide sufficient proof that it is not discriminating against CLECs in the use of its BFR process and its creation of products.

41. Qwest asserts that providing notice to CLECs of BFRs from other CLECs raises competitive issues. Qwest states the CLECs offer no definitive trigger for "productizing" BFRs. Qwest states it will make a given BFR a standard offering when, in the exercise of its sound discretion, it believes it makes sense to do so. Qwest argues that AT&T's attempt to expand the SRPs is inappropriate and that the issue was resolved in previous workshops.

42. Regarding dissemination of information about BFRs, Staff supports including in the SGAT the following language proposed by the multi-state facilitator:

> Qwest shall make available a topical list of BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow a CLEC to understand the general nature of the product, service or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also be required upon the request of a CLEC to provide sufficient details about the terms and conditions of any granted requests to allow a CLEC to elect to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or service available under this SGAT. A CLEC shall be entitled to the same offering terms and conditions made under any granted BFR provided that Qwest may require the use of the ICB pricing where it makes a demonstration to the CLEC of the need thereof.

43. Staff agrees with the CLECs that if a product is technically feasible and a type of

interconnection created, they it should be made available to all CLECs. Staff recommends that Qwest, with CLEC input, develop a series of criteria that should accelerate the "productization" of BFRs and that this process should be incorporated in the CICMP and the SGAT.

44. Staff also agrees with the CLECs that there is nothing unique about UNEs that makes them any more or less amenable to SRP resolution that other non-standard elements or services. Staff recommends that Qwest modify Exhibit F of the SGAT to allow CLECs to use the SRP process for all services and products for which Qwest has no product offering, and for which there is no need to test for technical feasibility.

45. In its April 5, 2002 Comments, Qwest states it does not oppose modifying Exhibit F. Qwest objects, however, to Staff's recommendation that Qwest develop standard criteria for "productizing" BFRs. Qwest asserts that the BFR process was developed to address truly unique situations. Qwest claims the record shows that the product list in the SGAT is extensive and meets the CLECs' needs as demonstrated by the fact that the BFR is rarely requested. Qwest states BFRs by their nature are "product specific" and address unique situations. Qwest states it would be extremely difficult to develop criteria, as there is no standard or consensus on how many "similar" BFRs warrant standardization.

46. Staff responds to Qwest's objection by explaining that Staff is not requesting that Qwest come up with a specific number of BFRs before a product would become standardized. Staff believes there are a "myriad" of other factors Qwest considers when deciding whether to productize a BFR. Staff recommends that Qwest put these considerations in writing so that CLECs would have an indication of Qwest's decision process.

47. In analyzing whether to require Qwest to provide the CLECs with information concerning other BFRs, the multi-state facilitator weighed the CLECs' need for prompt notice from Qwest when technical barriers precluding a form of access have come down, with the risk to CLECs that competitors may learn something about their business. The facilitator concluded that CLECs can protect confidential information and that "[w]hat other CLECs need to see is not the request, but the particular form of access to Qwest's network that Qwest will provide as a result of the request." We find that the multi-state facilitator's approach is a good one and should be adopted. The burden on

CLECs to have to inquire of Qwest if a technical barrier to access has been overcome may be significant. We agree that it is likely that CLECs with concerns of privacy will find ways to protect confidential information. Thus, we adopt Staff's recommendation to include the SGAT language proposed by the multi-state facilitator concerning notice of BFRs. With the addition of the multi-state language that requires Qwest to keep a topical list of BFRs, we are less concerned that Qwest will be able to abuse its discretion in determining when a product arising from the BFR process should become a standard product. Qwest shall make the topical list available on its website or other easily accessible location. The CLECs and the Commission will be able to monitor the types of products being requested and made available by Qwest. Consequently, we will not impose a requirement on Qwest to reduce their decision criteria to writing at this time.

DISPUTED ISSUE NO. 5: Should SGAT provisions expire upon expiration of terms for SGAT or other interconnection agreements if provisions are selected through the "pick and choose" process for incorporation into new or existing interconnection agreements?

48. AT&T asserts that a "pick and choose" provision should inherit the expiration dates of the agreements into which they are being imported rather than the agreements from which they are taken.

49. SGAT Section 1.8.1 provides that when opting into a provision of the SGAT, Qwest may require the CLEC to accept "Legitimately Related" provisions to ensure the provision retains the context set forth in the SGAT. AT&T objected to Qwest's definition of "Legitimately Related" in SGAT Section 4.0, which AT&T argued was purely subjective and resulted in arbitrary application.

50. Qwest argues that provisions taken from existing interconnection agreements pursuant to "pick and choose" rights should have the expiration date that is coterminous with the expiration date of the original agreement, otherwise, CLECs would be able to extend "pick and choose" provisions indefinitely. Qwest states the FCC and other state commissions that have addressed the issue have supported Qwest's position. Qwest cites *In re Global NAPs, Inc.*[3] where the FCC states that any language taken from an existing agreement must keep the expiration date of the original agreement. Qwest argues that perpetual pick and choose provisions should be avoided because they

[3] *In re Global NAPs, Inc.*, CC Docket No. 990154, FCC 99-199 (rel. Aug. 3, 1999).

deprive Qwest of the ability to appropriately respond to evolving and changing market conditions.

51. Qwest proposed the following language to address CLEC concerns concerning "Legitimately Related":

> 1.8.2 In addition, Qwest shall provide to CLEC in writing an explanation of why Qwest considers the provisions legitimately related including legal, technical or other considerations.
>
> 4.97 "Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(I) of the Act, and not those that specifically relate to other interconnection, services or elements in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties to that particular interconnection, service or element. The terms and conditions would not include General Terms and Conditions to the extent that the LEC Interconnection agreement already contains the requisite General Terms and Conditions.

52. Staff believes that based on the *Global NAPs* decision, Qwest's position regarding termination of pick and choose provisions is correct. In *Global NAPs* the FCC finds that "in such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date."

53. Staff states that SGAT Section 1.8.1 places the burden on Qwest to demonstrate that any provision it seeks to include is "legitimately related" to the element, service or interconnection requested. Staff believes these provisions appear to sufficiently limit Qwest's ability to include unrelated terms and conditions. Staff recommends that Qwest's proposed SGAT Section 1.8.1 and 4.0 be approved.

54. We agree that the FCC has answered the issue of the termination dates for provisions that have been "picked and chosen" from other agreements remains the same as in the original agreement. To hold otherwise is to potentially require Qwest to offer a particular term or condition in perpetuity. SGAT Section 1.8.1 places the burden on Qwest to establish that a SGAT provision is legitimately related. Qwest's proposed SGAT language for Sections 1.8.1 and 4.97 are sufficient to protect CLECs from being forced to accept unrelated terms. Where they dispute Qwest's interpretation of "legitimately related", the CLECs can avail themselves of the dispute resolution process, which includes the right to bring a complaint before this Commission.

DISPUTED ISSUE NO. 6: Should Qwest's tariffs or changes in regulations automatically amend the SGAT?

55. CLECs contend that Qwest can make a change to a tariff that would, through changes to the SGAT, unilaterally amend the Interconnection Agreements.

56. Qwest argues that any tariff change requires Commission approval. Qwest proposes language for SGAT Section 2.1 as follows:

> This Agreement includes this Agreement and all Exhibits appended hereto, each of which is hereby incorporated by reference in this Agreement and made a part hereof. All references to Sections and Exhibits shall be deemed to be references to Sections of and Exhibits to, this Agreement unless the context shall otherwise require. The headings and numbering of Sections and Exhibits used in this Agreement are for convenience only and will not be construed to define or limit any of the terms in this Agreement or affect the meaning and interpretation of this Agreement. Unless the context shall otherwise require, any reference to any statute, regulation, rule, Tariff, technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards, shall be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) of that statute, regulation, rule, Tariff, technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards that is in effect. Provided, however, that nothing in this Section 2.1 shall be deemed or considered to limit or amend the provisions of Section 2.2. In the event a change in a law, rule, regulation or interpretation thereof would materially change this Agreement, the terms of Section 2.2 shall prevail over the terms of this Section 2.1. In the case of any material change, any reference in this Agreement to such law, rule, regulation or interpretation thereof will be to such law, rule, regulation or interpretation thereof in effect immediately prior to such change until the processes set forth in Section 2.2 are implemented. The existing configuration of either Party's network may not be in compliance with the latest release of technical references, technical publications, or publications of telecommunications industry administrative or technical standards.

57. Staff believes that Qwest should not be allowed to alter the terms and conditions of interconnection agreements through unilateral tariff filings. In the Final Report, Staff stated that Qwest's proposed language is satisfactory as long as in the future Qwest files, with any new or modified tariff filing, a statement that identifies how that tariff will impact its SGAT and any other agreements with competitors. Staff states that Qwest should be required to modify its SGAT to include such "impact statement" with any tariff filing. Staff also recommends that Qwest give notice on its web-site, of all new tariff filings and the date filed. Staff states that changes in tariffs should

operate on a prospective basis, and not operate to change the terms and conditions of existing interconnection agreements. Staff also recommended that Qwest publish on its web-site any new statutes, rules, technical references, technical administrative or technical standards and any other applicable technical publications which it intends to invoke or use on a going forward basis pursuant to Section 2.1 which would represent a change in Qwest's current policy or relationship with CLECs.

58. Qwest does not object to Staff's recommendation to publish on its web-site any updated version of its technical publications as long as Qwest is only being required to publish changes required pursuant to the CMP. Qwest objects to a "tariff impact statement." Qwest believes such impact statement is unnecessary as SGAT Section 2.3 specifies that in cases of conflict between the SGAT and an existing tariff, the SGAT prevails. Qwest states that SGAT Section 2.3 also addresses the situation where a new version of a tariff may not "conflict" with the SGAT but may abridge or expand the rights or obligations of either party. In such case, Section 2.3 provides the agreement shall control. Qwest states it has over 100 approved or pending interconnection agreements and to require it to prepare a "tariff impact statement" would be burdensome. Qwest states further that CLECs have the ability to participate in tariff proceedings that affect them.

59. In response to Qwest's objections to a "tariff impact statement", Staff recommends that in the alternative, Qwest be required to file a Notice to the Change Management Process E-mail Distribution List of all Tariff filings on the date filed, which contains a description of the filing including the Section of the tariff being amended or newly included, and a brief description of the subject matter of the tariff as well as the effective date.

60. The provisions of SGAT Section 2.3 provide that unless the Commission determines otherwise, the SGAT terms will prevail over conflicting tariff terms or tariff terms that expand the rights or obligations of either party. These provisions, along with the CLECs' rights to participate in tariff proceedings protects CLECs from Qwest making unilateral changes in terms of the agreement. Although the Commission approves new tariffs and modifications to tariffs, some tariff changes can go into effect without Commission action pursuant to A.R.S. §40-367. Staff's modified recommendation that Qwest provide notice to CLECs through the CMP E-mail Distribution List of all tariff filings is a reasonable method for disseminating information. The burden on Qwest is not great

and it places some of the responsibility for determining the effect of tariff changes on the CLECs who are in the best position to understand the effects. In reviewing tariffs, the Commission will benefit from the participation of entities that are directly affected. Qwest should revise its SGAT in accord with Staff's modified recommendation.

DISPUTED ISSUE NO. 7: What is the appropriate process for updating the agreement when there is a change in law?

61. Qwest's SGAT Section 2.2 addresses updating the SGAT for "changes in law". It had contained a provision to establish an interim agreement, 60 days for negotiation followed by application of the dispute resolution process if the Parties were not able to agree.

62. The CLECs complained that Qwest's language forced CLECs to an immediate change to contracts for "immaterial" changes and a very abbreviated opportunity to modify agreements to accommodate "material" changes in the law. Plus, they argued, Qwest's proposal that the parties arbitrate interim agreements pending the outcome of the primary arbitration was resource draining for CLECs.

63. WorldCom proposed language for SGAT Section 2.2 that eliminated the interim agreement and set timeframes and conditions for updating agreements. In part WorldCom proposed:

> To the extent that the Existing Rules are vacated, dismissed, stayed or materially changed or modified, then this Agreement shall be amended to reflect such legally binding modification or change of the Existing Rules, where the Parties fail to agree upon such an amendment within sixty (60) days after notification from a Party seeking amendment due to modification or change of the Existing Rules or if any time during such sixty (60) Day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) Days, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be amended as set forth in Section 2.2 to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. Any amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. During the pendency of any negotiation for an amendment pursuant to Section 2.2, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement.

64. Although Qwest states it continues to believe in the merits of an interim operating agreement, Qwest has agreed to adopt WorldCom's language with the addition of the following

definition of "legally binding" :

> For Purposes of this section, "legally binding" means that the legal ruling has not been stayed, no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation as passed.

65. In its May 15, 2002, Response, Staff withdrew its objection to Qwest's definition of "legally binding." In its April 10, 2002 Comments, AT&T states it had requested the "legally binding" language. Staff recommends adopting Qwest's proposed language. Although initially concerned that the SGAT's dispute resolution language may discourage a party from resorting to the Commission to resolve a dispute, Staff has verified that Qwest's SGAT Section 5.18 provides that each party reserves the right to bring an action under the agreement to the Commission or other appropriate regulatory body.

66. Qwest's modified SGAT Section 2.2 eliminates the provisions the CLECs found objectionable. We find that it is reasonable and should be adopted.

DISPUTED ISSUE NO. 8: How should conflicts between the SGAT and other Qwest documents and tariffs be treated?

67. The parties agree that the SGAT is the prevailing document if conflicts arise.

68. Qwest proposed SGAT Section 2.3 and 2.3.1 to memorialize the understanding and confirm the precedence of the SGAT.

69. Staff agrees with Qwest's proposal except for the implementation of an interim operating agreement. Staff believes the parties should operate under existing agreements throughout the dispute resolution process. After modifying its recommendation in response to comments to the Proposed Findings, Staff ultimately proposes the following language for SGAT Section 2.3 and 2.3.1:

> 2.3 Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT, then the rates, terms and conditions of this SGAT shall prevail. To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail.
>
> 2.3.1 If either Party believes, in good faith, that a change in Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to

> Qwest's or CLEC's rights or obligations under this SGAT, the Parties will resolve the matter under the Dispute Resolution process. Any amendment to this Agreement that may result from such Dispute Resolution process shall be deemed effective on the effective date of the change for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. During the pendency of the Dispute Resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement.

70. On February 7, 2002, Qwest submitted a Notice of Withdrawal of SGAT Section 2.3.1. Qwest states in its April 5, 2002 Comments, that with its voluntary withdrawal, prior disagreements concerning Section 2.3.1 are moot. Qwest urges the Commission adopt Staff's recommendations regarding Section 2.3.

71. Staff's proposed language for Section 2.3 is reasonable and should be adopted. Section 2.3.1 should be eliminated. Qwest should revise its SGAT accordingly.

DISPUTED ISSUE NO. 9: Should liability for losses related to performance under the Agreement be limited to the total charges billed to CLEC during the contract year, except for willful misconduct?

72. Qwest's SGAT Section 5.8 provides for limitation of liability as follows:

> 5.8.1 Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed. Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises.
>
> 5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan.
>
> 5.8.3 Intentionally left blank.
>
> 5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective

agents, subcontractors or employees.

5.8.5 Nothing contained in this Section 5.8 shall limit either Party's obligations of indemnification specified in this Agreement, nor shall this Section 5.8 limit a Party's liability for failing to make any payment due under this Agreement.

73. AT&T argued that the limitations protect Qwest, not the CLECs despite reciprocal language. AT&T asserts that "Qwest's promise to perform under the contract becomes illusory at best because it suffers no real threat of liability should it fail to perform while the CLEC essentially loses the benefit of the bargain and potentially suffers even greater damage." The CLEC's, it argues are hugely dependent upon Qwest's services to compete in the local market, and it is doubtful CLECs will enter the market if they are unable to hold Qwest accountable for the harm actually caused to the CLEC. The CLECs argue the language is too restrictive and wants to replace "willful misconduct" with "gross negligence, willful misconduct and repeated breaches of material obligations of the Agreement."

74. Qwest argues its language comports with existing industry practice and state law. Qwest states that commissions have indicated that it is in the public interest to limit liability of regulated industries such as public utilities in order to ensure public access to utility services at affordable rates. Without such limitations of liability, costs associated with potential risk of lawsuits would otherwise be passed on to captive ratepayers thus raising rates and limiting wider public access of utility services. Qwest argues that when parties are unable to freely negotiate an agreeable level of liability risk and factor such risk into the offering price, contractual limitations such as those proposed by Qwest are required. Qwest asserts that AT&T does not challenge that the limitation reflects longstanding industry practice. Qwest also states that it has agreed to adopt the multi-state facilitator's language for Section 5.8.4: "Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.

75. Staff recommends adopting Qwest's proposed language.

76. In its April 9, 2002 Comments, AT&T proposes that the following be added to Section

5.8.1: "Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT Section."

77. We agree with AT&T that its proposed sentence be added to Section 5.8.1. This language is the corollary to language in Section 5.8.2 that provides nothing in Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan. With this addition, we believe SGAT Section 5.8 is reasonable given industry practice. Qwest should revise its SGAT accordingly.

DISPUTED ISSUE NO. 10: Should AT&T's proposed restrictions on Qwest's sale of exchanges in the Assignment Clause be adopted?

78. AT&T proposed in a new SGAT Section 5.12.2 that requires the interconnection agreement for exchanges which Qwest sells be assigned (to the purchaser) for the entire term of the agreement and that Qwest require the purchaser to agree to this condition. AT&T's proposed SGAT Section 5.12.2 provides:

> 5.12.2 Transfer of all or part of Qwest Telephone Operation. If Qwest directly or indirectly (including without limitation through a transfer of control or by operation of law) sells, exchanges, swaps, assigns, or transfers ownership or control of all or any portion of Qwest's telephone operations (any such transaction, a "Transfer") to any purchaser, operator or other transferee (a "Transferee") Qwest must:
>
> a. obtain a written agreement from the Transferee, prior to the Transfer (in form and substance reasonably satisfactory to AT&T), that Transferee agrees to be bound by the interconnection and intercarrier compensation obligations set forth in this Agreement with respect to the portion of Qwest's telephone operations so transferred, until an interconnection agreement between CLEC and the Transferee becomes effective.
>
> b. provide CLEC with prompt written notice of any agreement or understanding relating to any proposed Transfer, and in any event at least one hundred eighty (180) days written notice of the completion of such Transfer.
>
> c. Use its best efforts to facilitate discussions between CLEC and the Transferee with respect to the Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement;
>
> d. Serve CLEC with a copy of any Transfer application or other related regulatory documents associated with the Transfer when filed with the Commission or the FCC;
>
> e. Not oppose CLEC's intervention in any proceeding relating

> to the Transfer; and not challenge the Commission's authority in any proceeding relating to the transfer to hear the issue of whether the Transferee should be required to adopt any or all of the terms of this Agreement.

79. WorldCom states that this condition provides certainty and stability to the CLECs. The CLECs state that failure to continue the agreement for its full term could cause financial harm, as it could be more expensive for CLECs to interconnect with ex-Qwest exchanges.

80. Qwest views the CLEC position as giving CLECs unusual control over Qwest's business decisions for the sale of exchanges and placing undue restrictions on the buyer.

81. In its Proposed Findings, Staff believed that the issue was moot after Qwest's sale of 38 rural wire centers to Citizens was cancelled.

82. In its Comments on the Proposed Findings, AT&T stated that the cancellation of the Citizens sale did not eliminate the need for certainty. When Qwest sells an exchange, the CLEC will have customers and no interconnection agreement with the purchaser. AT&T asserts the legal obligations of the purchaser during the period from the date of the purchase to the approval of an interconnection agreement is unclear, and AT&T states that CLECs should have some certainty that the new purchaser will abide by existing legal obligations of Qwest that are related to the exchanges. AT&T states that obligations in the interconnection agreements can be factored in the sale price, as are other obligations imposed on the purchaser through any sale. WorldCom supports AT&T.

83. Upon reconsideration, in its Final Report, Staff agrees with the CLECs and recommends that Qwest include a provision in its SGAT which requires that the interconnection agreement for any exchanges that Qwest sells be assigned to the purchaser for the entire term of the agreement and that Qwest include such condition in its sales agreements with any future purchaser of its exchanges.

84. In its April 5, 2002 Comments to the Final Report, Qwest opposes Staff's recommendation that the purchasing party be bound by all of Qwest's agreement with the CLECs for the entire term of the SGAT. Qwest states such requirement would substantially devalue Qwest's assets by placing liabilities on the purchasing party. Qwest argues that Staff's proposed language would prevent the CLECs and a purchaser from negotiating a new agreement and would prevent the Commission from considering what, if any, obligations to impose on the purchaser and Qwest at the

time it considers the proposed sale. Qwest proposes that as a compromise the Commission should adopt the multi-state facilitator's resolution. The proposal would add the following to SGAT Section 5.12.2:

> In the event that Qwest transfers to any unaffiliated party exchanges including end users that CLEC serves in whole or in part through facilities or services provided by Qwest under this Agreement, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of ninety (90) Days from notice to CLEC of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other state statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.

85. In its Response, Staff disagrees with Qwest, and continues to believe that CLECs are entitled to some certainty for the term of their interconnection agreements. Staff states it is not unusual for there to be a term in the agreement for the sale of exchange assets to provide that the agreement will remain in effect until the new buyer and the CLEC agree on a new interconnection agreement.

86. We agree that if Qwest sells any or part of its wire centers, it is important that an interconnection agreement Qwest has negotiated with the CLEC, and which the CLEC has relied upon, remain in effect until the CLEC and purchaser are able to negotiate a new agreement. In any case, the Agreement with Qwest remains in effect until the Commission approves the sale and transfer of the exchange. We believe that it should continue in effect unless the CLEC and prospective purchaser are able to negotiate a new agreement of their own and the Commission has approved that agreement. Nothing in the SGAT should prevent a CLEC and purchaser from negotiating a new interconnection agreement or prevent the Commission from approving one. The 90-day limit imposed by the multi-state approach is too limiting, and potentially meaningless if the Commission can extend the deadline without limit. The proposed language is also ambiguous about what constitutes notice to the CLEC and may not provide the Commission with sufficient time to evaluate whether to extend the operation of the agreement. Qwest should draft SGAT language, subject to comment by the parties, that comports with our finding that the Agreement should remain in effect

until a successor agreement is approved by the Commission.

DISPUTED ISSUE NO. 11: What is the appropriate scope of audits?

87. Qwest's SGAT Section 18 concerning audits is limited to review of billing information.

88. The CLECs support a broader audit authority under Section 18 of the SGAT. They believe that audit authority should be expanded to include the right to examine services performed under the agreement. For example, CLECs believe the audits should be able to confirm that Qwest is maintaining CLEC forecasts in the manner prescribed by law.

89. Qwest contends a CLEC-requested audit is intended to review billing information exchanged by the parties, including books, records and other documents used in the process of billing for services performed. Qwest states that the Performance Assurance Plan ("PAP") provides for mini-audits within the PAP process. Qwest states that if the parties have concerns about the quality of service or Qwest's performance, the appropriate forum is the dispute resolution process. According to Qwest, to extend the audit beyond the billing process would enable CLECs to harass and overly burden Qwest.

90. In its Proposed Findings, Staff generally agreed with Qwest that the CLECs had other avenues for assessing Qwest's performance. Staff, however, believed there was a need for new SGAT language to address proprietary information use and recommended the following addition:

> Either party may request an audit of the other's compliance with this SGAT's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other. Those audits shall not take place more frequently than once in every three years, unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits, the party to be audited may also request the use of an independent auditor.

91. In its Comments to the Proposed Findings, AT&T states that Staff has not shown that the performance audits and biennial review address the CLECs' concerns regarding their right to

examine whether Qwest is performing under the agreement. AT&T also claims that Staff's proposed language is internally inconsistent, as it permits a compliance audit, but prohibits investigations or testing for compliance.

92. WorldCom request a third sentence be added to Section 5.18.1 as follows: "Nothing in this Section 18 shall preclude the right of any party to examine service performed under this Agreement and address any alleged deficiencies of Qwest's performance of those services under Section 5.18 concerning dispute resolution proceedings, or under all other remedies available in law or in equity." WorldCom believes this sentence incorporates the CLECs' existing rights under the SGAT.

93. Staff agrees with WorldCom's proposal and recommends that Qwest add the following to the end of SGAT Section 5.18.2:

> Nothing in Section 18 shall preclude the right of any party to examine service performed under this agreement and address any alleged deficiencies or Qwest's performance of those services before the Commission, or under Section 5.18 concerning dispute resolution proceedings, or under all other remedies available in law or in equity.

94. In its Comments to the Final Report, Qwest states it conferred with WorldCom about the intent of WorldCom's proposed language. Qwest asserts that WorldCom clarified to it that its intent was that the language be added to Section 18.1 as a third sentence and that its purpose is to state the parties' existing rights under the SGAT. Based on its discussions with WorldCom, Qwest states that it and WorldCom have agreed to the following addition to Section 18.1:

> Nothing in this Section shall limit or expand the dispute resolution provision in Section 5.18.

95. In its Response to Qwest's Comments on the Final Report, Staff states it has no objection to the proposed addition to SGAT Section 18.1.

96. Rather than burden the process and Qwest with numerous and potentially serial and overlapping audits, we find that the CLECs' ability to resort to the dispute resolution process or to bring an issue before the Commission should protect them from potential Qwest failure to perform under the Agreement. We expressly reserve the right to require an audit of Qwest's operations related to the service failure at issue if it would assist the resolution of the dispute. We find that WorldCom's

clarification to Section 18.1 is reasonable and should be adopted.

DISPUTED ISSUE NO. 12: Whether Qwest's proposed definition of "Legitimately Related" is sufficient.

97. The CLECs argue that Qwest exaggerates and abuses the use of "legitimately related" and that its use is purely subjective and arbitrary.

98. As discussed in connection with Disputed Issue No. 5, Qwest proposed a new definition of "Legitimately Related" in SGAT Section 4.97. The CLECs did not object to Staff's recommendation, to adopt Qwest's proposed new definition.

99. We find Qwest's proposed definition in SGAT Section 4.97 is reasonable and should be adopted.

DISPUTED ISSUE NO. 13: What should be the term of the agreement?

100. The parties have agreed on a three year term.

101. Staff concurred with the three year term and recommends that the SGAT continue in force and effect at the end of the three-year period until an order is entered by the Commission approving its withdrawal, if the Commission finds that withdrawal is in the public interest. Staff recommends that Qwest include language in its SGAT that contains Staff's proposal pertaining to SGAT withdrawal.

102. In its Comments to the Final Report, Qwest objects to Staff recommending additional conditions on a provision on which the parties have reached consensus. Section 5.2.2 provides:

> Upon expiration of the term of this Agreement, this Agreement shall continue in force and effect until superceded by a successor agreement by written notice to the other Party no earlier than one hundred sixty (160) days prior to the expiration of the term, or the Agreement shall renew on a month to month basis. The date of this notice will be the starting point for the negotiation window under Section 252 of the Act. This Agreement will terminate on the date a successor agreement is approved by the Commission.

Qwest states that given the straightforward process outlined in the SGAT, Staff's recommended conditions are unnecessary and confusing. Qwest argues, further, that no party advocated Staff's position.

103. In its Response to Qwest's Comments to the Final Report, Staff states there is no

requirement that Staff accept "consensus" language if Staff believes that language is not in the public interest. Staff asserts that because Qwest is relying on its SGAT language to meet its 271 obligations, Staff believes that it is not unreasonable to require Qwest to obtain Commission approval to withdraw its SGAT.

104. Qwest and Staff appear to be discussing two different issues. Qwest interprets the issue to be what should be the term of an interconnection agreement based on the SGAT. Qwest states the parties have agreed that three years is a reasonable term. Staff appears to be discussing how long the SGAT should remain available as the standard interconnection agreement. Staff believes the SGAT should remain available until the Commission approves its withdrawal. We agree with both positions. As an individual interconnection agreement, three years is a reasonable term. At the expiration of that initial three-year term the parties can elect to negotiate a new agreement or allow the agreement to continue on a month to month basis. The initial agreement terminates only upon Commission approval of a successor agreement between the parties. However, to approve the concept of a three-year term is different than saying that the SGAT itself (as a standard offer interconnection agreement) will terminate and/or be withdrawn in three years. Qwest's shall offer the SGAT as a standard interconnection agreement to any entity until the Commission authorizes otherwise. If such provision is not contained in the SGAT, Qwest should revise its SGAT accordingly.

DISPUTED ISSUE NO. 14: Whether Qwest's SGAT has adequate revenue protection language.

105. The parties have reached consensus on the following language:

> 11.34 Revenue Protection. Qwest shall make available to CLEC all present and future fraud prevention of revenue protection features. These features include, but are not limited to, screening codes, information digits '29' and '70' which indicate prison and COCOT pay phone originating line types respectively; call blocking of domestic, international, 800, 888, 900, NPA-976, 700 and 500 numbers. Qwest shall additionally provide partitioned access to fraud prevention, detection and control functionality within Operations Support Systems which include but are not limited to LIDB Fraud monitoring systems.
>
> 11.34.1 Uncorrectable or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the Party causing such error or malicious acts, if such malicious acts could have reasonably been avoided.

11.34.2 Uncollectable or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements of their subtending operational Support Systems by unauthorized third parties that could have reasonably been avoided shall be the responsibility of the Party having administrative control of access to said network Element or operational support system.

11.34.3 Qwest shall be responsible for any direct uncollectable or unbillable revenues resulting from the unauthorized physical attachment to Loop facilities from the Main Distribution Frame up to and including this Network Interface Device, including clip-on fraud, if Qwest could have reasonably prevented such fraud.

11.34.4 To the extent that incremental costs are directly attributable to a revenue protection capability requested by CLEC, those costs will be borne by CLEC.

11.34.5 To the extent that either Party is liable to any toll provider for fraud and to the extent that either Party could have reasonably prevented such fraud, the Party who could have reasonably prevented such fraud must indemnify the other for any fraud due to compromise of its network (e.g. clip-on, missing information digits, missing toll restriction, etc.).

11.34.6 If Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.

106. Staff recommends that Qwest include the above consensus language in its updated SGAT.

107. We concur.

DISPUTED ISSUE NO. 15: Use of confidential information.

108. This issue is the same, but of broader scope, as Disputed Issue No. 2 concerning forecast information.

109. In its Proposed Findings, Staff recommended that Qwest add language to its SGAT concerning the treatment of confidential information in general.

110. WorldCom proposes that Qwest add the same language that the parties agreed to Colorado as follows:

5.16.3 Each Party shall keep all of the other Party's Proprietary Information confidential and will disclose it on a need to know basis only. In no case shall retail marketing, sales personnel, or strategic planning have access to such Proprietary Information. The Parties shall use the other Party's Proprietary Information only in connection with this

> Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing. If either Party loses, or makes an unauthorized disclosure of, the other Party's Proprietary Information, it will notify such other Party immediately and use reasonable efforts to retrieve the information.

111. Staff believes the proposed language is reasonable and should be included in Qwest's SGAT.

112. We concur.

CONCLUSIONS OF LAW

1. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Commission has jurisdiction over Qwest.

2. The Commission, having reviewed the Final Report on Qwest's Compliance with General Terms and Conditions, BFR and Forecasting dated March 21, 2002, approves and adopts the Final Report, as modified herein, conditioned upon the Commission's approval of Qwest's Change Management Process.

3. The Commission has authority to approve any and all modifications to the SGAT, and the SGAT shall remain available as Qwest's standard interconnection agreement until the Commission authorizes otherwise.

ORDER

IT IS THEREFORE ORDERED that the Final Report dated March 21, 2002, on Qwest Corporation's Compliance with Requirements on General Terms and Conditions, BFR and Forecasting, is hereby adopted as modified herein and conditioned upon the Commission's approval of Qwest's Change Management Process and Qwest filing SGAT language that complies with the Findings and Conclusions adopted herein.

IT IS FURTHER ORDERED that Qwest Corporation shall file by June 30, 2002, a revised SGAT incorporating the Findings and Conclusions herein.

IT IS FURTHER ORDERED that CLECs and other interested parties shall have ten days following Qwest Corporation's filing of the revised SGAT to file written comments concerning the proposed SGAT language.

IT IS FURTHER ORDERED that Commission Staff shall file within twenty days (20) of

Qwest Corporation's filing, its recommendation to adopt or reject the proposed SGAT language and a procedural recommendation for resolving any remaining dispute.

IT IS FURTHER ORDERED that Qwest Corporation's SGAT, as modified from time to time after Commission approval, shall remain available, as the standard interconnection agreement, until the Commission authorizes otherwise.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER COMMISSIONER

COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, JAMES G. JAYNE, Interim Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 25th day of August, 2003.

JAMES G. JAYNE
INTERIM EXECUTIVE SECRETARY

DISSENT _____
JR:dap

SERVICE LIST FOR: U S WEST COMMUNICATIONS, INC. (SECTION 271)

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ORIGINAL

T-00000A-97-0238

IN THE MATTER OF QWEST CORPORATION'S
SECTION 271 APPLICATION

ACC Docket No. T-00000A-97-0238

FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW ON QWEST'S SGAT SECTION 5: GENERAL TERMS AND CONDITIONS, BFR AND FORECASTING

MARCH 21, 2002

DECISION NO. 66201

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. On May 30, 2001, a Workshop on General Terms and Conditions, Bona Fide Request (BFR) and Special Request Process (SRP) took place at Hewlett-Packard's facilities in Phoenix. Parties appearing at the Workshop included Qwest, AT&T, MCI WorldCom, Covad, Sprint and the Arizona Corporation Commission Staff and consultants. Qwest relied upon its filed affidavits submitted on April 4, 2001, May 11, 2001 and May 15, 2001. Additional comments were filed on May 4 and 25, 2001 by AT&T, May 3 and May 25, 2001 by MCI WorldCom and May 3 and May 24, 2001 by Covad. On June 13, 2001, an additional Workshop was conducted on Terms and Conditions, Bona Fide Request (BFR) and Special Request Process (SRP).

2. While many issues were successfully resolved between the parties, General Terms and Conditions, BFR and SRP was deemed "disputed" due to parties' inability to come to agreement on a number of issues which eventually went to impasse. Staff filed its Proposed Findings of Fact and Conclusions of Law and its recommendations as to each of the disputed issues on December 27, 2001. On January 14, 2002, Qwest and WorldCom filed comments on Staff's Proposed Findings of Fact and Conclusions of Law. On January 16, 2002, AT&T also filed comments on Staff's Proposed Findings of Fact and Conclusions of Law. Following are Staff's Final Recommended Findings of Fact and Conclusions of Law on the Section of Qwest's SGAT addressing General Terms and Conditions, the BFR Process and Forecasting.

B. DISCUSSION

Overview of Report Layout

3. The section of this report on General Terms and Conditions requires an organization different than that used for previous Staff reports. General Terms and Conditions are for the most part addressed by the parties at an SGAT section and subsection level. The report organization therefore addresses each SGAT issue addressed by a party at the lowest (most detailed) level practical. In some cases, the comments and testimony were at a more macro level. In other cases, a party would address multiple subsections in such a manner that further division of the discussion was not deemed possible without altering the intent of the language. This results in some inevitable inconsistencies in the report layout.

Background

4. This report attempts to focus comments on items that are specifically reflected in proposed changes to the SGAT. Detailed comments and support are found in the testimony and affidavits. It is not the intent of this report to duplicate all of these comments. Special note needs to be made of WorldCom's comments. WorldCom submitted limited testimony that specifically addresses SGAT sections. WorldCom's

comments for the most part consisted of an alternative proposed document that was submitted without associated discussion. This results in Qwest referring to WorldCom comments when in fact there are no comments but rather only suggested text. This report does not present all of the suggested WorldCom text because the suggested document does not always align with the SGAT and without additional supporting testimony, there is no underlying support for WorldCom's proposed language changes.

Format

5. Parties commenting on a particular section of the terms and conditions are each shown in individual SGAT sections. For simplicity, all comments shown under a heading can be assumed to be from that party unless noted.

6. In cases where the parties argue for specific SGAT wording changes, a Resolutions section describes the wording as resolved. Resolved, in this case, means the agreed upon wording appears in the November 30, 2001 SGAT, ninth revision.[1] Certain sections had commentary but no specific language changes. These sections required no resolution. Certain other sections had only comments from Qwest. These sections also do not need or have a resolution except in those cases where language is different from that discussed in the Qwest position section. Finally, the wording "no significant changes" is sometimes used in resolution sections. This means that changes made were only in capitalization, hyphenation or other typographical changes. All changes in actual wording/content of Resolution sections from those contained in position discussions are described herein.

C. ISSUES REGARDING SPECIFIC SGAT SECTIONS

7. This section of the report describes each party's position by SGAT Section and pulls together various references from the many testimony documents.

Sections 1.2 and 1.3 (Offer of Services)

a) Qwest Position [2]

8. Neither AT&T nor WorldCom commented on Section 1.2. Qwest would like to delete this section since it pertains to Qwest's template negotiations agreement and not the SGAT. Similarly, Section 1.3 should be changed to refer to the SGAT instead of an agreement. These changes are reflected in the following:

> 1.2 ~~If this document is being used as the basis for negotiations of an Interconnection Agreement, it is between _____, ("Competitive Local Exchange Carrier" or "CLEC") a _____ corporation and~~

[1] Qwest has agreed to import all consensus language from other Region workshops. Such language may not yet appear in some instances in the November 30, 2001 version of the SGAT which Staff reviewed for this report. Staff is in the process of verifying that all consensus language has been included, however if it is not, Staff will, in a supplemental report, require Qwest to include such agreed upon language.

[2] Qwest Errata Rebuttal – pgs 6,7

~~Qwest Corporation ("Qwest"), a Colorado corporation, pursuant to Section 252(f) of the Telecommunications Act of 1996, for purposes of fulfilling Qwest's obligations under Sections 222, 251(a), (b), and (c), 252, 271, and other relevant provisions of the Act and the rules and regulations promulgated thereunder.~~ Intentionally Left Blank.

1.3 This ~~Agreement~~SGAT sets forth the terms, conditions and pricing under which Qwest will offer and provide to any requesting CLEC network Interconnection, access to Unbundled Network Elements, Ancillary services, and Telecommunications Services available for resale within the geographical areas in which both Parties are providing local exchange service at that time, and for which Qwest is the incumbent Local Exchange Carrier within the State of Arizona for purposes of providing local Telecommunications Services. This ~~Agreement~~SGAT is available for the term set forth herein.

b) WorldCom Position[3]

9. WorldCom suggested the following language modifications in their May 25 filing.

1.2 If this document, or portions thereof, is being used as the basis for negotiations of an Interconnection Agreement, it is between _____, ("Competitive Local Exchange Carrier" or "CLEC") a _____ corporation and Qwest Corporation ("Qwest"), a Colorado corporation, pursuant to Section 252(f) of the Telecommunications Act of 1996, for purposes of fulfilling Qwest's obligations under Sections 222, 251(a), (b), and (c), 252, 271, and other relevant provisions of the Act and the rules and regulations promulgated thereunder.

1.3 This Agreement sets forth the terms, conditions and pricing under which Qwest will offer and provide to any requesting CLEC network Interconnection, access to unbundled network elements, separately or in any technically feasible combination, Ancillary services, and Telecommunications Services available for resale within the geographical areas in which both Parties are providing local Exchange Service at that time, and for which Qwest is the incumbent Local Exchange Carrier within the State of Arizona for purposes of providing local Telecommunications Services. This Agreement is available for the term set forth herein.

Resolution

10. Section 1.2 remains intact without the addition of the "or portions thereof" suggested by WorldCom. 1.3 remains as in the Qwest position with the exception being the wording "agreement" is retained instead of SGAT in the first and last sentences.

[3] WorldCom Supplemental pgs 3-4

Sections 1.4 and 1.5

a) Qwest Position

11. Qwest did not address these sections.

b) WorldCom Position[4]

12. WorldCom offered the following changes in the May 25 filing also without comment.

> 1.4 Individual CLECs may adopt this SGAT, in whole or in part, in lieu of, or in addition to, entering into an individual Interconnection agreement, by signing the Signature Page in Section 22 of this SGAT and by delivering a signed copy of this SGAT to Qwest, pursuant to the notification provision of this SGAT contained in Section 5.21, or by opt in notification. Upon adoption of the SGAT, or any portion thereof, by CLEC, the SGAT becomes an Interconnection agreement between Qwest and CLEC, or a part of an interconnection agreement between Qwest and CLEC.
>
> 1.5 This SGAT, once it is approved or permitted to go into effect by the Commission, offers CLECs an alternative, or an additional option, to negotiating an individual Interconnection agreement with Qwest, purchasing from the Arizona Local Network Interconnection and Service Resale Tariff or adopting an existing approved Interconnection agreement between Qwest and another CLEC pursuant to Section 252(i) of the Act. In this respect, neither the submission nor approval of this SGAT, nor any provision herein, shall affect Qwest's willingness to negotiate an individual agreement with any requesting carrier pursuant to Section 252 of the Telecommunications Act of 1996.

c) Covad Position[5]

13. Section 1.4 should be revised to make clear that CLECs can "pick and choose" from various provisions contained in the SGAT. As currently drafted, Section 1.4 suggests that CLECs must adopt the SGAT in whole.

Resolution

14. Sections 1.4 and 1.5 adopted the WorldCom inserted term "interconnection" before agreement. No other changes were made to either section.

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[4] WorldCom Supplemental pgs 4-5
[5] Covad – Zulevic Testimony pg 15

Section 1.6

a) Qwest, AT&T, and MCI Position

15. The parties do not address this Section.

Section 1.7 – Modifications to the SGAT

a) AT&T Position[6]

16. In Section 1.7 of the SGAT, Qwest reserves the right to modify its SGAT at any time once this Commission approves it. However, in the second half of section 1.7, the language states: "At the time any amendment is filed, the section amended shall be considered withdrawn, and no CLEC may adopt the section considered withdrawn following the filing of any amendment, even if such amendment has not yet been approved or allowed to take effect." This "immediate withdrawal" is not consistent with the review period called for in section 252(f) of the Act. Moreover, it amounts to an immediate change in the availability of the SGAT without notice to the Commission or CLECs.

17. AT&T proposes that section 1.7 of the SGAT be deleted in its entirety and replaced with the following:

> 1.7 Following the date this SGAT is approved by the Commission, this SGAT shall remain available for adoption for two years. At the end of such two-year period, this SGAT shall remain available until its withdrawal by Qwest is approved by the Commission. Qwest may not modify this SGAT in any way without notice to the Commission and the CLEC community, an opportunity for CLECs to be heard regarding such modifications and approval by the Commission.

18. This language proposed by AT&T is intended to insure that the SGAT remains available for at least two years in the form approved by the Commission in this docket.

19. That assertion can only be maintained if the SGAT, in the approved form, remains available for a substantial period of time. If that form is to change for any reason, all CLEC parties should be notified and given the opportunity to comment and be heard on whether such modifications are appropriate. Finally, any such modification should not be allowed to go into effect without Commission approval.

[6] AT&T Initial Comments pgs 7,8

b) Covad Position[7]

20. Section 1.7 should be revised to permit CLECs to take advantage of any term or provision contained in the SGAT until such time as the Commission approves any change or amendment to, or withdrawal of, such provision.

c) Qwest Position[8]

21. AT&T argues that this section is not in compliance with the Act. The proposed AT&T language would virtually freeze Qwest's business in place to the benefit of no one. To address AT&T's concern, Qwest proposes the following:

> 1.7 —Any modification to the SGAT by Qwest will be accomplished through Section 252 of the Act.

Resolution

22. The first sentence of Section 1.7 now starts with: Following the date this SGAT is approved or allowed to take effect, Qwest may file amendments to this SGAT, which shall be approved or permitted to take effect pursuant to the Schedule for Review set forth in Section 252(f) of the Act. No other changes were made.

SGAT Section 1.7.1 – Need for Contract Amendments

a) AT&T Position[9]

23. AT&T argues CLECs have long had difficulty getting timely service from Qwest when Qwest creates products or policies that are not contained in its SGAT or interconnection agreements.[10] Part of the problem is created by Qwest's demand that every agreement must be amended in order for the CLEC to acquire the product or implement the policy.

24. AT&T addresses the Qwest claim that the product issue was "resolved" in other jurisdictions when Qwest agreed to modifications to Section 9.23.2 as set forth in the supplemental affidavit. AT&T points out that it is unclear whether Qwest has incorporated this language in all jurisdictions and more specifically in this docket. Further, Qwest's 9.23.2 language in fact does not resolve the productization issue according to AT&T.

25. Qwest's language merely provides for more convenient access to existing products (and, more specifically, existing UNE products). Qwest's proposal does nothing to eliminate the frustrating and cumbersome process Qwest requires CLECs to endure because of inappropriate conditions and restrictions Qwest associates with its products.

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[7] Covad – Zulevic testimony pg 15
[8] Qwest rebuttal pg. 7
[9] AT&T Supplemental Testimony of May 25, 2001 pages 2-4 unless noted.
[10] This problem has been coined the "productization" problem.

26. Qwest proposes that a CLEC that has this Section 1.7.1 in its interconnection agreement can order new Qwest products not specifically addressed in the interconnection agreement as long as the CLEC accepts all of the terms and conditions for the new product that have been unilaterally determined by Qwest.[11] What Qwest's proposal fails to address are the situations when a CLEC does not agree with the terms and conditions that Qwest imposes with its new product.

27. Qwest allowing CLECs to order new Qwest products immediately upon the terms unilaterally determined by Qwest does not take care of the CLEC concern. The objectionable items are: (1) the terms that come with Qwest products and (2) the creation of "products" that should otherwise already fall within the scope of Qwest's legal obligations and agreements.

b) Qwest Position[12]

28. Qwest has developed pre-defined UNE combinations in the SGAT to simplify the ordering and provisioning processes for both for the CLEC and Qwest. In the UNE workshops, Qwest agreed, however, that CLECs are not limited to the pre-defined UNE combinations in the SGAT. Qwest will provision UNE combinations pursuant to the terms of the SGAT without requiring an amendment to a CLEC's interconnection agreement, provided that all UNEs making up the UNE combination are contained in the CLEC's interconnection agreement.

29. In other jurisdictions, this issue was resolved when Qwest agreed to revise Section 9.23.2 to state as follows:

> "UNE Combinations are available in, but not limited to, the following standard products: a) UNE-P in the following form: (i) 1FR/1FB Plain Old Telephone Service (POTS), (ii) ISDN – either Basic Rate or Primary Rate, (iii) Digital Switched Service (DSS), (iv) PBX Trunks, and (v) Centrex; b) EEL (subject to the limitations set forth below). If CLEC desires access to a different UNE Combination, CLEC may request access through the Special Request Process set forth in this Agreement. Qwest will provision UNE combinations pursuant to the terms of this Agreement without requiring an amendment to CLECs interconnection agreement, provided that all UNEs making up the UNE Combination are contained in CLECs interconnection agreement. If Qwest develops additional UNE combination products, CLEC can order such products without using the Special Request Process, but CLEC may need to submit a CLEC questionnaire amendment before ordering such products. "

[11] In other workshops these product proposals have also proven to contain conditions that are contrary to the law and the agreements.
[12] Brotherson Supplemental Pgs 10-13 unless noted.

30. Qwest wants formal amendments to the interconnection agreement when a new product or service (i.e. "new interconnection services, access to additional unbundled network elements, additional ancillary services or Telecommunications Services available for resale") is offered.

31. Qwest has also been exploring the need for formal amendments to an interconnection agreement under certain circumstances. The CLECs have "expressed concern" that they are unable to take immediate advantage of new product offerings due to the time it takes to obtain Commission approval for the amendment. Qwest has a process in place that includes amendments to agreements called "parallel processing".[13] Under this concept, a CLEC with an existing interconnection agreement may execute an amendment for a new product. If the CLEC also executes a letter agreement setting forth the rate, terms and conditions related to the new product, the CLEC may begin placing orders as soon as the letter agreement is executed, without waiting for the amendment to be approved. The letter agreement addresses what will occur if the Commission does not approve the amendment.

32. Qwest also proposes a more streamlined approach to offering new services. If a CLEC currently has an interconnection agreement, the CLEC will require only one amendment to adopt the proposed language contained in Section 1.7.1. In the case of a CLEC that adopts the SGAT as its interconnection agreement, no amendments will be required to order new products and services. Qwest will introduce new products through the product notification process, which is a part of the formal change control process (Co-Provider Industry Change Management Process - CICMP). It will post the applicable terms and conditions for the new product in its Template Agreement available at:

http://www.qwest.com/wholesale/customerService/clec__nta.html

33. If a CLEC is interested in this offering, it will need to first complete a New Product Questionnaire for the service. Then, by placing its orders, the CLEC agrees to be bound by the specific rates, terms, and conditions in the Template Agreement under the umbrella of its interconnection agreement, but without the necessity of a formal amendment. The CLEC would also have the option of negotiating different terms and conditions. Language is then proposed to be included in SGAT Section 1.7.1:

1.7.1 Amendments

1.7.1 Notwithstanding the above or anything contained in Section 1 of this SGAT, if the Commission orders, or Qwest chooses to offer and CLEC desires to purchase, new Interconnection services, access to additional Unbundled Network Elements, additional Ancillary Services or Telecommunications Services available for Resale which are not contained in this SGAT, no formal amendment to the Interconnection Agreement is

[13] Page 12 - Brotherson affidavit

necessary. Qwest will notify CLEC of the availability of these new services through the product notification process through the Co-Provider Industry Change Management Process ("CICMP"). CLEC must first update the relevant section(s) of the New Product Questionnaire to establish ordering and billing processes. Then by placing its orders, CLEC agrees to abide by all of the then current rates, terms and conditions as set forth in the then current Template Agreement applicable to such new services. If CLEC wishes to negotiate an Amendment with different terms and conditions than defined in the then current Template Agreement, CLEC agrees to abide by those terms and conditions until the Amendment is approved and a parallel processing letter agreement is executed.

Resolution

34. The language as suggested in the Qwest position was adopted.

Section 1.8 – Pick and Choose

a) **AT&T Position**[14]

35. AT&T has had recent experience attempting to pick and choose from Qwest's SGAT. Based on this experience and the problems encountered, AT&T believes all parties need to assess whether the dispute resolution processes contained in Section 1.8 are adequate. There is particular concern with the speed with which the process brings resolution.

36. Qwest's failure to fully and timely comply with its obligations under section 252(i) constitute a failure to negotiate in good faith and create barriers to entry, while undermining Qwest's full compliance with the Act, in particular section 271.

37. With respect to the pick and choose obligation, AT&T provided two recent examples in which Qwest: (1) interprets its obligation in a way that is commercially unreasonable and frustrates the CLECs opportunity to interconnect with Qwest; and (2) abuses its bargaining position by making unreasonable demands aimed at undermining compliance with section 271 and the investigation related thereto.

- Qwest's Interpretation of the Termination Periods Related to Provisions Chosen from Agreements is Commercially Unreasonable and violates the Act.

- Qwest Unreasonably demands that CLECs Relinquish Their Rights under the Act In Order to Pick and Choose

[14] AT&T Supplemental Testimony pg 4, Initial Comments pgs 9-15

Certain Provisions and it Illegally Limits the Contracts from which CLECs May Choose.

b) Covad Position[15]

38. Section 1.8 (including subparts) is confusing because it mixes and matches phrases and terms relating to provisions that are "legitimately related" or "unrelated" to any provision "picked and chosen" by a CLEC. Section 1.8 should be revised to address separately these two issues.

c) Qwest Position[16]

39. Qwest states that AT&T does not take issue with the SGAT language but rather the implementation of the language. Qwest also notes that AT&T and other CLECs have agreed to this language in other states.

40. Qwest states that "AT&T first takes offense at Qwest's policy of limiting CLECs' use of any chosen provision to the remaining time that that provision would have existed under the original agreement which contains the provision." Qwest cites an FCC ruling under 252(I) and the implementing FCC rules (47 C.F.R. § 51.809). In footnote 25, the FCC stated that there should be a streamlined process for opting-in and went on to state:[17]

> In such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of the agreement), including its original expiration date.[18]

41. From this Qwest concludes: "Clearly, not only is AT&T's proposed language not required, it is inconsistent with the law."

42. Regarding specific AT&T allegations that Qwest has demonstrated bad faith in implementing this provision, Qwest states:

> "The first instance cited relates to AT&T's request to be able to opt-into Section 7.2.2.9.1.1 of the SGAT so that it would receive "blocking reports" behind tandem switches where it interconnects. It has now been discovered that there was a fair amount of miscommunication between the parties. Qwest believed that AT&T had really intended to ask for the reports included in 7.2.2.8.7. Qwest and AT&T have now cleared up the confusion and the

[15] Covad - Zulevic testimony pg 15
[16] Qwest Rebuttal pgs 8-11
[17]/ Qwest Rebuttal Affidavit pg 8
[18]/ Qwest Errata Rebuttal Affidavit pg 9

companies will enter into an amendment incorporating 7.2.2.9.1.1 into the AT&T contracts.

43. In the second instance cited by AT&T, AT&T wants to pick and choose specific sections from the current Wyoming multi-state SGAT. Specifically, AT&T wants to pick and choose Sections 7.1.1 through 7.1.2.5, which primarily focus on securing provisions relating to the right to have a Single Point of Interconnection or Presence ("SPOP") in a LATA. Qwest has asked AT&T to pick other sections from the SGAT that are legitimately related to these provisions.

44. Qwest takes issue with what AT&T has termed arbitrary behavior. At issue is the legitimately related requirement in Section 1.8. Qwest cites the FCC's pick and choose discussion in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Radio Service Providers,* First Report and Order on Local Competition, CC Docket No. 96-98 & 95-185 (rel. Aug. 8, 1996) ("First Report and Order") at ¶1315.[19] Qwest also cites the FCC's pick-and-choose rules the United States Supreme Court specifically cited the "legitimately related" concept:

45. AT&T is seeking to "pick and choose" language dealing with trunking throughout an entire single LATA state. It is appropriate to include the language in Section 7.2.2.9.3.2 on separate trunking in the amended language because it is an integral part of Qwest's SPOP offering and is designed to minimize the impact upon Qwest's network which employs separate local and toll trunking.

46. Qwest notes that "While the terms of Qwest's SPOP offer are in dispute, it is important to look at the language in Section 1.8, which has been agreed to by AT&T following negotiations". It is prefaced by the phrase: "Because this SGAT is Qwest's standard contract offer . . ." While these issues remain in dispute, the concepts included in these provisions are Qwest's standard contract offer and Qwest is perfectly within its rights to insist that they are legitimately related and must be included in the Amendment.

Resolution

47. No specific language changes were proposed or made to SGAT Section 1.8 or subparts thereof.

Section 2 – Interpretation and Construction

a) AT&T Position[20]

48. Section 2.1 of the SGAT addresses other documents referenced in the SGAT. AT&T and other CLECs have expressed concern about including references to external documents, particularly when Qwest controls those external documents. Prior to adoption of the SGAT, CLECs should be able to review such referenced documents and

[19]/ Pages 9 & 10 - Larry Brotherson Errata Rebuttal Affidavit
[20] AT&T Initial Comments pgs 15-18

determine whether they are acceptable or not. With respect to any document outside the SGAT that Qwest controls including, but not limited to, tariffs, product descriptions, processes, Technical Publications and methods and procedures, Qwest should not be allowed to make unilateral changes that affect CLEC obligations under the SGAT.

49. AT&T suggests a simpler solution would be to state in the SGAT that to the extent Qwest makes changes to any of these documents after the effective date of the adoption by CLEC of the SGAT, such changes shall not be effective as to the CLEC unless CLEC consents to such changes.

b) WorldCom Position[21]

50. WorldCom addresses sections 2.1, 2.2 and 2.3 in a combined section in its May 25th Supplemental Testimony. WorldCom states that Qwest does not specifically include Arizona state rules, regulations and laws within the definition of "Existing Rules" and believes the definition should include these. WorldCom also wants the SGAT to reflect in this section that this Agreement is in compliance with Existing Rules, as opposed to "based upon" Existing Rules. Section 2.2 identifies some specific rulings, but not all rulings and should be deleted for more generic language.

51. Language regarding the incorporation of Tariffs, IRRG product descriptions, Technical Publications and other documents outside of the Agreement which address matters set forth in the Agreement, should be revised so that Qwest cannot do a "back-door", unilateral amendment to this Agreement by revising such documents or filing a conflicting Tariff. WorldCom is concerned about the filing of tariffs superceding the SGAT. The CLEC must be able to rely on its terms and conditions and know that they cannot be unilaterally changed by Qwest through otherwise unrelated tariff filings.

52. WorldCom proposes the following revisions to Section 2:

> 2.1 This Agreement includes this Agreement and all Exhibits appended hereto, each of which is hereby incorporated by reference in this Agreement and made a part hereof. All references to Sections and Exhibits shall be deemed to be references to Sections of, and Exhibits to, this Agreement unless the context shall otherwise require. The headings used in this Agreement are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning of this Agreement. Unless the context shall otherwise require, any reference to any agreement, other instrument (including Qwest or other third party offerings, guides or practices), statute, regulation~~,~~ or rule ~~or Tariff~~ applies to such agreement, instrument, statute, regulation or~~,~~ rule ~~or Tariff~~ as amended and supplemented from time to time (and, in the case of a statute, regulation or~~,~~ rule ~~or Tariff~~, to any successor provision).

[21] WorldCom Supplemental, pgs 5-10

2.2 The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). Among the Existing Rules are the results of arbitrated decisions by the Commission, which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in AT&T Corp., et al. v. Iowa Utilities Board, et al. on January 25, 1999. Many of the Existing Rules, including rules concerning which Network Elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding Bell Operating Companies' (BOCs)' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest or CLEC concerning the interpretation or effect of the Existing Rules or an admission by Qwest or CLEC that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified. To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. ~~Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.~~ It is expressly understood that this Agreement will also be amended ~~corrected~~ to reflect the outcome of generic proceedings or dockets initiated under or pursuant to the Act by the Commission for pricing, service standards, or other matters covered by this Agreement. This Agreement does not incorporate the rates, terms and conditions of any tariff. If Qwest files or is required to file a tariff or makes or is required to make a similar filing that would otherwise be governed by this Agreement, Qwest shall: (i) consult with CLEC reasonably in advance of the filing about the form and substance of the filing; (ii) provide to CLEC its proposed filing and obtain CLEC's agreement on the form and substance prior to the filing; and (iii) take all steps reasonably necessary to ensure that the tariff or other filing imposes obligations upon Qwest that are as close as possible to those

provided in this Agreement and preserves for CLEC the full benefit of the rights otherwise provided in this Agreement. Qwest may not otherwise file any tariff or similar filing that purports to govern the services provided under this Agreement that is inconsistent with the terms and conditions (including rates) set forth in this Agreement. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules or Commission order, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. This Section 2.2 shall be considered part of the rates, terms and conditions of each Interconnection, service and network element arrangement contained in this Agreement, and this Section 2.2 shall be considered legitimately related to the purchase of each Interconnection, service and network element arrangement contained in this Agreement.

2.3 ~~In cases of conflict between Qwest's IRRG product descriptions, methods and procedures, or a Technical Publication, and this Agreement, the rates, terms and conditions of this Agreement shall prevail over such IRRG product descriptions, methods and procedures, or a Technical Publication.~~

In cases of conflict between Qwest's 1.) IRRG product descriptions, 2.) methods and procedures, 3.) Technical Publications or 4.) any other Qwest information or documentation, including but not limited to Product Notifications, that purport to address matters that are addressed in this Agreement, and this Agreement, then the rates, terms and conditions of this Agreement shall prevail over such IRRG product descriptions, methods and procedures, [or a] Technical Publications or any other Qwest documentation. In addition, no Qwest documentation shall add terms and conditions that are not already contained in this Agreement. If Qwest believes that any rate, term or condition contained in this Agreement needs further clarifications, Qwest will submit such proposed clarifications to CLEC under the co-provider change management process ("CICMP") described in Section of this Agreement for negotiation and approval. In the event, Qwest and CLEC cannot agree, Qwest may seek to amend this agreement if it desires to clarify the rates, terms or conditions of this Agreement. Further, in the event, Qwest and CLEC cannot agree, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. In no event shall Qwest modify this Agreement or any document referenced in this Agreement without CLEC approval or Commission approval.

53. WorldCom argues that defaulting to filed tariffs gives Qwest the power to change the interconnection agreement without WorldCom's consent or approval.

WorldCom disagrees that participation in cost proceedings provides the opportunity to "influence" the rates and that the tariffs litigated in such proceedings represent the general rates, terms and conditions available to the population of Arizona CLECs. WorldCom further states that the tariffs are neither intended nor designed to address the needs of individual CLECs with particularity. Qwest's tariffed rates should apply only where the parties to an interconnection agreement or the SGAT have expressly agreed that a tariffed offering should be applied to the provision of a service covered under their interconnection agreements.

54. WorldCom changes to Sections 2.2 and 2.3 are intended to prevent Qwest from unilaterally attempting to modify the Agreement by modifying material incorporated by reference in the SGAT. WorldCom states that Qwest's proposed Section 2.3 only addresses a portion of the problems raised by WorldCom in earlier workshops.

c) Covad Position[22]

55. While Section 2.3 addresses "direct" conflicts between the SGAT and external Qwest documents referenced therein, it in no way addresses the situation in which the external document (1) does not directly conflict with an SGAT term; (2) imposes obligations and duties in addition to those contained in the SGAT, or (3) imposes additional obligations and duties in situations in which the SGAT is silent.

d) Qwest Position 2.1[23]

56. AT&T suggests that the problem could be solved "through a process by which CLECs are provided notice and the opportunity to participate in all such changes" or by stating in the SGAT that any changes to external documents after the Agreement is adopted are only effective as to the Agreement if the CLEC consents to such changes.[24]

57. To satisfy CLEC concerns in this area, Qwest has developed the CICMP. The CICMP will allow CLECs to provide input regarding changes to Qwest's products and processes, providing information exchange and allowing the participation of the CLECs in changes.[25] CLECs are also provided notice and an opportunity to participate in any change to a tariff.

58. Because safeguards are in place to ensure that CLECs are afforded an opportunity to participate in any changes to external documents referenced in the SGAT, there is no need to revise this aspect of the SGAT language.[26] Even though Qwest's position is that no change is required, they offered a new Section 2.3. This section basically states that to the extent there are conflicts between these external documents and the SGAT, the SGAT will prevail.[27] This wording follows:[28]

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[22] Covad - Zulevic testimony pg 15
[23] Qwest rebuttal pgs 11-15
[24] Qwest references AT&T Initial Comments, pg 15
[25]/ Qwest Rebuttal pg 12
[26]/ Qwest Rebuttal pg 12
[27]/ Qwest Rebuttal-pg 12

In cases of conflict between Qwest's IRRG product descriptions, methods and procedures, or a Technical Publication, and this Agreement, the rates, terms and conditions of this Agreement shall prevail over such IRRG product descriptions, methods and procedures, or a Technical Publication.

59. WorldCom also proposes language regarding the significance of the headings and numbering of the SGAT. AT&T states, "Because WorldCom does not cite any corresponding language from the SGAT, this is presumably a provision that WorldCom determined was not included in Qwest's SGAT." AT&T points to Section 2.1 of the SGAT containing a provision regarding the meaning and import of headings:

> The headings used in this Agreement are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning of this Agreement.[29]

60. WorldCom's proposal from Document MWS-1 reads as follows:[30]

The headings and numberings of Sections, Parts and Attachments in this Agreement are for convenience only and will not be construed to define or limit any of the terms in this Agreement or affect the meaning or interpretation of this Agreement.[31]

61. With regard to WorldCom's proposed language, Qwest summarizes with:

> "Although the language of the competing provisions is similar and WorldCom offers no reason why its proposal should be adopted, Qwest is willing to revise the SGAT to incorporate WorldCom's language with one exception. WorldCom's proposal refers to "Parts, and Attachments" to the SGAT. The SGAT itself refers to "Exhibits" in numerous places. The words "Parts, and Attachments" has no meaning in the SGAT."

Qwest revised the SGAT to reflect the above as follows:[32]

> 2.1 This Agreement ("Agreement") includes this Agreement and all Exhibits appended hereto, each of which is hereby incorporated by reference in this Agreement and made a part hereof. All references to Sections and Exhibits shall be deemed to be references to Sections of, and Exhibits to, this Agreement unless the context shall otherwise require. The headings and numbering of Sections and Exhibits used in this Agreement are for convenience only and will not be construed to define or limit any of the terms in this Agreement or affect the meaning and interpretation of this Agreement. Unless the context shall

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[28] Qwest Supplemental Testimony Pg 2
[29]/ Qwest Rebuttal –pg13
[30]/ Page 13 - Qwest Errata Rebuttal Affidavit
[31]/ Page 13 - Qwest Errata Rebuttal Affidavit
[32]/ Page 13 - Qwest Errata Rebuttal Affidavit

otherwise require, any reference to any agreement, other instrument (including Qwest or other third party offerings, guides or practices), statute, regulation, rule or Tariff applies to such agreement, instrument, statute, regulation, rule or Tariff as amended and supplemented from time to time (and, in the case of a statute, regulation, rule or Tariff, to any successor provision).

Resolution

Section 2.1 language as given in the Qwest position was incorporated in the SGAT.

Section 2.2

a) AT&T Position[33]

62. Much of section 2.2 is an unnecessary statement regarding the state of the law and reservations of Qwest's right to change its position. AT&T argues that a process is needed for cases when parties interpret the law differently. The concern is with delays in the process. AT&T proposes changes to the language as follows:

> 2.2 The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). Among the Existing Rules are the results of arbitrated decisions by the Commission, which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in *AT&T Corp., et al. v. Iowa Utilities Board, et al.* on January 25, 1999. Many of the Existing Rules, including rules concerning which Network Elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding BOCs' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or stop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified, provided that such

[33] AT&T Initial Comments

positioning shall not interfere with performance of the obligations set forth herein. ~~To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. This Section shall be considered part of the rates, terms and conditions of each Interconnection, service and network element arrangement contained in this Agreement, and this Section shall be considered legitimately related to the purchase of each Interconnection, service and network element arrangement contained in this Agreement.~~

2.2.1 In the event that any legally binding legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of CLEC or Qwest to perform any material terms of this Agreement, CLEC or Qwest may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within thirty (30) days after such notice, or if at any time during such 30-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 5.18, for expedited Dispute Resolution. For purposes of this Section 2.2.1, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed.

1.2.2 During the pendency of any renegotiation or dispute resolution pursuant to Section 2.2.1 above, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, unless the Commission, the Federal Communications Commission, or a court of competent jurisdiction determines that modifications to this Agreement are required to bring it into compliance with the Act, in which case the Parties shall perform their obligations in accordance with such determination or ruling.

b) Qwest Position[34]

63. Both AT&T and WorldCom commented on sections 2.2 and 2.3. Regarding AT&T's comments, Qwest states that the SGAT already requires the parties to use the alternative dispute resolution process if they cannot agree on implementing a change in law. Because AT&T has provided no compelling reason to replace the language of Section 2.2 as currently written, Qwest sees no need to revise it by incorporating the changes suggested by AT&T.[35]

64. WorldCom proposed four specific changes:

- Adding "state rules, regulations, and laws to the definition of "Existing Rules". Qwest addresses each individually.
- Stating that the SGAT is "in compliance" with, rather than "based on", the Existing Rules
- Deleting the references to specific rulings "for more generic language"
- Adopting WorldCom's proposed additional language stating that any reference to a tariff is a reference to the terms that existed on the date the Agreement became effective and, absent the CLEC's consent and amendment of the Agreement, not any subsequent modifications to the tariff. Each proposed change is then addressed in turn.

65. Regarding the first two points, Qwest is willing to add "state rules, regulations, and laws" to the definition of "Existing Rules", and a statement that the Agreement is "in compliance" with the Existing Rules. With respect to WorldCom suggestion 3, although WorldCom fails to offer an example of "more generic language," Qwest is willing to delete the references to specific rulings. Qwest sees no need to adopt WorldCom's proposed additional language regarding subsequent modifications to tariffs. Qwest is not taking the position that a CLEC is only entitled to an interconnection agreement where no tariff exists. The SGAT language on this issue recognizes that both tariffs and interconnection agreements may co-exist. In addition, new Section 2.3 proposed language should ameliorate this concern.

66. Regarding WorldCom's concern on tariff references, Qwest states that these concerns should not affect SGAT language. Section 2.3 addresses this concern and second, the SGAT language applies to the extent that the SGAT references tariffs.

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[34] Qwest Rebuttal pages 14-21

[35]/ Page 17 - Larry Brotherson Errata Rebuttal Affidavit

67. Qwest further states that WorldCom misstates their ability to participate in tariff proceedings. Qwest further stated "It is patently absurd, therefore, for WorldCom to claim that Qwest has "nearly unilateral control" over pricing and that CLECs are deprived of their lawful rights to participate in these proceedings."

68. Regarding the WorldCom concern that the SGAT does not address individual CLEC needs, Qwest states, " The purpose of these proceedings is not to satisfy the individual needs of each CLEC; rather, it is to ensure that Qwest provides *universal* terms and conditions that satisfy the Act."

69. Based on WorldCom's testimony, Qwest is willing to revise Section 2.2 of the SGAT as follows:

> 2.2 The provisions in this Agreement are in compliance with and based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, including but not limited to state rules, regulations, and laws, as of the date hereof (the "Existing Rules"). Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or stop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified. To the extent that the Existing Rules are changed, vacated, dismissed, stayed, or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. This Section shall be considered part of the rates, terms and conditions of each Interconnection, service and network element arrangement contained in this Agreement, and this Section shall be considered legitimately related to the purchase of each Interconnection, service and network element arrangement contained in this Agreement.

Resolution

70. Qwest language for Section 2.2 as proposed above was adopted in the SGAT. AT&T proposed changes were not accepted.

Section 2.3

a) AT&T Position[36]

71. Section 2.3 is meant to ensure that the SGAT is first in the order of priority among the various documents incorporated by Qwest into the SGAT. Qwest should add language that ensures extraneous terms and conditions, which properly belong in the SGAT but are found in these other documents and are non-binding unless incorporated into the SGAT.

b) Qwest Position[37]

72. AT&T makes comments on this section and WorldCom proposes language. Qwest addresses AT&T's comments first. As described above, Qwest is implementing the CICMP, which provides CLECs an opportunity to comment on changes to certain Qwest documents. There is no need to adopt AT&T's suggested language. [38]

73. WorldCom goes a step further than AT&T and suggests language to include in the SGAT.[39] However, Qwest takes issue with the revised wording. Qwest states:[40]

> "Although Qwest is willing to adopt some of the language suggested by WorldCom, Qwest cannot agree to many aspects of the provision. For example, the term "any other Qwest information or documentation, including but not limited to Product Notifications" is too broad to include in an agreement like the SGAT. The point of Section 2.3 is to *specifically* identify the potential documents that could conflict with the SGAT. Therefore, in keeping with that theme, Qwest is willing to add "Product Notifications" to the list of documents, but not to expand the list to include any information or documentation. Further, the term "that purport to address matters that are addressed in this Agreement" is too vague to provide any real guidance. Qwest will revise the SGAT to include documents that "pertain to offerings in this SGAT.

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[36] AT&T Initial Comments, pg 18
[37] Qwest Errata Rebuttal, pgs 18-21
[38]/ Page 19 - Larry Brotherson Errata Rebuttal Affidavit
[39]/ Page 19 - Larry Brotherson Errata Rebuttal Affidavit
[40]/ Page 19 - Larry Brotherson Errata Rebuttal Affidavit

74. Further, Qwest has developed the CICMP to allow CLECs to have input into changes to certain Qwest documents.

75. Qwest is willing to revise the SGAT as follows:

> 2.3 In cases of conflict between Qwest's PCAT, methods and procedures, technical publications, or Product Notifications that pertain to offerings in this SGAT, then, the rates, terms and conditions of this SGAT shall prevail over such PCAT, methods and procedures, technical publications or Product Notifications. Qwest will submit such proposed clarifications to these documents under the co-provider change management process ("CICMP") described in Section 12 (specifically subsection 12.2.6) of the SGAT.

Resolution

76. The ninth SGAT revision dated November 30, 2001 contains wording different from the above. The SGAT language states:

> 2.3 In cases of conflict between Qwest's wholesale Product Catalog (PCAT) (formerly (IRRG), product descriptions, methods and procedures, a technical publication, or any other document and this Agreement, the rates, terms and conditions of this Agreement shall prevail over such PCAT product descriptions, methods and procedures, technical publications or other document.

77. Qwest should add the last sentence of it's proposed wording (in paragraph 75) to the SGAT, and make additional minor proposed wording changes in order to be truly compliant regarding SGAT Section 2.3.

SGAT Section 3 – Implementation Schedule

a) AT&T Position[41]

78. Sections 3.1, 3.2 and 3.3 require CLECs to complete and sign a "CLEC Questionnaire" and negotiate an "Interconnection implementation schedule" prior to placing any order for service.

79. Details of the CLEC Questionnaire should be specifically identified in the SGAT, or the CLEC Questionnaire should be attached to the SGAT so that the information Qwest may seek in such a Questionnaire is fixed for the term of the SGAT and not unilaterally changeable by Qwest. AT&T also wants Qwest to provide more details on what is expected from an implementation schedule (this was requested for the

[41] Qwest Rebuttal Pgs 21-23

workshops). Also, if a CLEC has already been doing business with Qwest under an interconnection agreement, these requirements should be waived.

80. Qwest should include language in this section that would ensure that these required documents do not create unnecessary or excessive burdens on CLECs or delays in provisioning of orders for service. Furthermore, a statement that the information a CLEC provides in these documents is subject to the nondisclosure and restricted use section of the SGAT is needed here.

b) Covad Position[42]

81. Covad stated that all of Section 3 is a problem because it requires the submission of a lengthy CLEC questionnaire even where the CLEC already has an interconnection agreement with Qwest and is simply "picking and choosing" provisions for inclusion in its interconnection agreement. There appears to be no basis upon which Qwest can or may require the submission of a questionnaire under these circumstances.

c) WorldCom Position

82. WorldCom states that to complete Qwest's CLEC Questionnaire in a timely manner, Qwest must participate in the completion of the Questionnaire within one business day of a CLEC's request. Also, the proposed "negotiation of an Interconnection Implementation schedule" could result in delays and is unnecessary. The completion of the CLEC Questionnaire provides Qwest with the information that it needs to begin provisioning interconnection, unbundled network elements and combinations thereof. Qwest has agreed to provision those products, facilities and services in accordance with its standard intervals.

83. In WorldCom's Supplemental testimony, they suggest Section 3 be revised as follows:

> **Section 3.0 - CLEC INFORMATION**
>
> 3.1 Except as otherwise required by law, Qwest will ~~not~~ promptly provide or establish Interconnection, unbundled network elements, ancillary services and/or resale of Telecommunications Services in accordance with the terms and conditions of this Agreement, or portions thereof, ~~prior to~~ following CLEC's execution of this Agreement or an interconnection agreement. The date on which CLEC signs and delivers an executed copy of this Agreement or an interconnection agreement, in accordance with Section 1, shall hereafter be referred to as the "Effective Date" of the Agreement between Qwest and CLEC. Thereupon, the Parties shall complete Qwest's "CLEC Questionnaire," ~~and negotiate an Interconnection implementation schedule~~ as it applies to CLEC's

[42] Covad - Zulevic testimony pg 16
[43] WorldCom – Supplemental Testimony pgs 10-12

obtaining of Interconnection, unbundled network elements, ancillary services, and/or resale of Telecommunications Services hereunder.

3.2 Prior to placing any orders for services under this Agreement, the Parties will jointly complete Qwest's "CLEC Questionnaire." Qwest personnel shall be available to participate in the completion of the CLEC Questionnaire upon oral request of CLEC within one business day from such request. This questionnaire will then be used to:

Determine geographical requirements;
Identify CLEC ~~I~~identification ~~C~~codes;
Determine Qwest system requirements to support CLEC's specific activity;
Collect credit information;
Obtain billing information;
Create summary bills;
Establish input and output requirements;
Create and distribute Qwest and CLEC contact lists; and
Identify CLEC hours and holidays.

3.3 ~~Prior to placing any orders for services under this Agreement, the Parties will finalize an Interconnection implementation schedule.~~ Upon completion of the CLEC Questionnaire Qwest shall process CLEC orders in accordance with Qwest's standard provisioning intervals. ~~Subject to the terms and conditions of this Agreement, each Party shall exercise reasonable efforts to adhere to the Interconnection implementation schedule.~~

3.4 Intentionally Left Blank ~~CLEC will provide an initial two (2) year forecast prior to placing any orders for service under this Agreement. During the first year of the term of this Agreement, the forecast shall be updated and provided to Qwest on a quarterly basis. During the remaining term of this Agreement, CLEC will provide updated forecasts from time to time, as requested by Qwest. The information provided pursuant to this paragraph shall be considered Proprietary Information under the Nondisclosure Section 5.16 of this Agreement. The initial forecast will minimally provide:~~

~~3.4.1 The date service will be offered (by city and/or state);~~

~~3.4.2 The type and quantity of service(s) which will be offered;~~

~~3.4.3 CLEC's anticipated order volumes; and~~

~~3.4.4 CLEC's key contact personnel.~~

Section 3.1

a) AT&T Position

84. The statement in section 3.1 that the parties have to "negotiate" an implementation schedule concerns AT&T. Since Qwest is the incumbent monopoly, a major competitor and a bottleneck supplier, CLECs should not be in a position of having to provide too much information to Qwest about their implementation plans.

Section 3.3

a) AT&T Position

85. AT&T states that Section 3.3 should be deleted. The need for an implementation schedule is not clear, particularly for a CLEC that has been doing business with Qwest for a number of years already.

b) Qwest Position[44]

86. Qwest combined their discussion of all Section 3 arguments and that discussion is all shown under this heading. Both AT&T and WorldCom expressed concern about the implementation schedule. Qwest is removing this provision since the schedules have not been negotiated in practice. Qwest has changed the header of the section to "CLEC Information."

87. Both AT&T and WorldCom comment on the CLEC Questionnaire. Regarding the WorldCom request that Qwest work with CLECs to complete the questionnaire within one day of an oral request, Qwest commits to doing so.

88. *Regarding the AT&T protest over updating the questionnaire,* Qwest responds that they have been working to address CLECs concerns about the questionnaire. Qwest has broken down the questionnaire into product-specific pieces. The questionnaires ask the CLECs for its identification code, e.g., Access Customer Name Abbreviation ("ACNA") information and contacts for billing information if it is not currently receiving a variety of reports, and information as to how it is accessing Qwest's Operation Support Systems ("OSS"). Qwest needs the information contained in the Questionnaire to establish its ordering and billing processes to ensure that the CLEC can order and receive the product in a timely manner. Qwest also needs the questionnaire for purposes as listed in Section 3.2. Qwest has begun working with CLECs on the questionnaire prior to execution of interconnection agreements as reflected in the removal of "thereupon" in Section 3.1.

[44] Qwest Rebuttal Pgs 21-23

89. Qwest's response to these issues and also the AT&T desire to have elements of the questionnaire identified in the SGAT are reflected in Qwest's new Section 3 wording.

Section 3.0 - CLEC INFORMATION

3.1 Except as otherwise required by law, Qwest will not provide or establish Interconnection, Unbundled Network Elements, ancillary services and/or resale of Telecommunications Services in accordance with the terms and conditions of this Agreement prior to CLEC's execution of this Agreement. The Parties shall complete Qwest's "CLEC Questionnaire," as it applies to CLEC's obtaining of Interconnection, Unbundled Network Elements, ancillary services, and/or resale of Telecommunications Services hereunder.

3.2 Prior to placing any orders for services under this Agreement, the Parties will jointly complete Qwest's "CLEC Questionnaire." This questionnaire will then be used to:

Determine geographical requirements;
Identify CLEC Identification Codes;
Determine Qwest system requirements to support CLEC's specific activity;
Collect credit information
Obtain billing information;
Create summary bills;
Establish input and output requirements;
Create and distribute Qwest and CLEC contact lists; and
Identify CLEC hours and holidays.

3.4 Intentionally Left Blank

Resolution

90. The Qwest proposed wording above was accepted along with the original Section 3.3 (See WorldCom comments under 3.0 above) which reads:

3.3 Prior to placing any orders for services under this Agreement, the Parties will finalize an Interconnection implementation schedule. Subject to the terms and conditions of this Agreement, each Party shall exercise reasonable efforts to adhere to the Interconnection implementation schedule.

SGAT Section 4 – Definitions

a) AT&T Position[45]

91. AT&T notes in their comments that Qwest did not file Section 4 in the Qwest Affidavit of April 4. AT&T comments are in that context.

92. Many of the definitions have been the subject of debate in other workshops and in many cases, Qwest has revised them in those workshops. Qwest must ensure that revisions that have been previously agreed to by Qwest and CLECs are reflected in the final SGAT.

93. Throughout the SGAT, Qwest has used capitalized terms inconsistently. In some cases, the phraseology is slightly askew, in others a word is not capitalized that should be, or capitalized but not defined. AT&T requests that Qwest rationalize the document's use of definitions to make its meaning clearer.

b) WorldCom Position[46]

94. WorldCom's comments in its Supplemental Testimony do not take into account the rebuttal comments of Qwest. As noted Qwest has acknowledged that the definitions section was not provided with initial testimony.

95. WorldCom understood that definitions have been addressed and agreed upon. However, they submit Part B – Definitions (Exhibit MWS-2) containing what WorldCom believes are definitions omitted in Qwest's SGAT. WorldCom argues, "These definitions should be included because they are relevant to the terms and conditions contained in the SGAT. Further to the extent a definition has not been previously agreed upon, and has not been discussed, WorldCom's definition should be used and Qwest's replaced."[47]

96. WorldCom has the following initial comments regarding Qwest's definitions:

> The term "Affiliate" is used throughout the SGAT, the following Affiliate definition should be inserted:
>
> "AFFILIATE" is an entity that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another entity. For the purposes of this paragraph, "own" or "control" means to own an equity interest (or equivalent) of at least 10%, or the right to control the business decisions, management and policy of another entity.

[45] AT&T Initial Comments Pg 20
[46] WorldCom Supplemental Testimony pgs 12-15
[47] WorldCom Supplemental Testimony pg 12

97. The phrase "Basic Exchange Feature" found in Section 4.6 should be deleted because WorldCom is unable to locate "Basic Exchange Feature" in the SGAT.

98. The definition of "Bona Fide Request should be modified as follows:

> 4.8 "Bona Fide Request" or "BFR" means ~~a request for a new Interconnection or for an unbundled element not already available in this Agreement for the provision of local Telecommunications Services.~~ Any request that requires an analysis of technical feasibility shall be treated as a Bona Fide Request (BFR), and will follow the BFR Process set forth in this Agreement. The BFR process shall be used for, among other things, the following:
>
> a. Requests for access to an unbundled network element that has not been defined by the FCC or the State Commission as a network element to which Qwest is obligated to provide unbundled access,
>
> b. Requests for UDIT and EEL above the OC-192 level, unless existing in Qwest's network and technically feasible,
>
> c. Requests for combinations of Unbundled Network Elements that are not ordinarily combined in the Qwest network. exchange Message Record found in Section 4.21 is not the most current standard for the exchange of telecommunications message information. The most current standard is Exchange Message Interface ("EMI"). EMI is defined as:

99. "Exchange Message Interface" or "EMI" means the format used for exchange of Telecommunications message information among Telecommunications Carriers. Alliance for Telecommunications Industry Solutions (ATIS) document that defines industry guidelines for the exchange of message records."

100. In Section 4.22 entitled "Exchange Service" Qwest indicates that Exchange Service is limited to traffic that is originated and terminated within the local calling area. The "termination" language used in Section 4.22 may create opportunities for Qwest to exclude ISP traffic from Exchange Service, as it does not technically "terminate" in the calling area, rather, is dumped into a modem bank. ISP traffic should be included in the definition of Exchange Service, and the definition should be altered to *include calls going into a modem bank.*

101. In Section 4.30, Qwest excludes Toll provided using Switched Access purchased by an IXC. Qwest should use the definition of Exchange Access found in the federal Act (section 3 Definitions of the Telecom Act), and leave any limitations to what it provides within that service to the sections where it is referenced for fair consideration.

102. Section 4.32 entitled "Local Interconnection Service Entrance Facility" should not be included in the SGAT. Entrance facilities should be determined and

designated by the network engineers in designing the Interconnection. The architecture does not necessarily work within this vague definition for entrance facilities.

103. Regarding Section 4.39 entitled "Meet Point Billing", Meet Point Billing only applies to Circuit Switching. Qwest puts an overreaching definition that includes references to ISP traffic. This paragraph should be modified to delete those references and should read as follows:

> "Meet-Point Billing" or "MPB" or "Jointly Provided Switched Access" refers to an arrangement whereby two LECs (Including a LEC and CLEC) jointly provide Switched Access Services with each LEC (or CLEC) receiving appropriate share of the revenues from the IXC as defined by their effective access Tariffs.

104. Further language "including phone to phone interexchange traffic that is transmitted over a carrier's packet switched network using protocols such as TCP/IP to and Interexchange Carrier" should be deleted.

105. Regarding Section 4.49 Qwest uses RFS dates as the starting point for billing of products/services. The ready for service date should not commence when Qwest unilaterally decides the product is ready, but rather when the CLEC has also checked and approved the deliverable. If there is dispute as to whether the product is ready, CLEC should not be subjected to a mistake on the part of Qwest, nor liable for costs when the product is not satisfactory.

106. The Special Request Process that is used in the SGAT should be defined as follows:

> Special Request Process - The Special Request Process shall be used for the following requests:
>
> a. Requesting specific product feature(s) be made available by Qwest that are currently available in a switch, but which are not activated.
>
> b. Requesting specific product feature(s) be made available by Qwest that are not currently available in a switch, but which are available from the switch vendor.
>
> c. Requesting a combination of Unbundled Network Elements that is a combination not currently offered by Qwest as a standard product and:
>
> i. that is made up of UNEs that are defined by the FCC or the Commission as a network element to which Qwest is obligated to provide unbundled

access, and; (This has been agreed to by Qwest)

ii. that is made up of UNEs that are ordinarily combined in the Qwest network.

d. Requesting an Unbundled Network Element that has been defined by the FCC or the State Commission as a network element to which Qwest is obligated to provide unbundled access, but for which Qwest has not created a standard product, including OC-192 UDIT and EEL between OC-3 and OC-192.

c) Qwest Position[48]

107. Qwest acknowledges AT&T and WorldCom's comments that Section 4 was not filed with the April 4 Affidavit. Qwest attached, as part of its Rebuttal Affidavit Section 4, Exhibit LBB-1. Exhibit LBB-1 "contains the definitions of the terms found in the SGAT and includes all revisions that were agreed to in the other workshops". This addresses AT&T's concerns and certain of WorldCom's concerns.

108. Qwest next addresses WorldCom's proposal in more detail. In particular, Qwest addresses the WorldCom proposal to replace SGAT language with WorldCom proposed language if the definition has not been agreed upon and not discussed. Qwest's exact comments are: "WorldCom's proposal makes no sense and should be rejected." Contrary to WorldCom's suggestion, it is not appropriate to replace any SGAT definition with WorldCom's definition simply because a definition has not been discussed or agreed upon. WorldCom offers no explanation why its definitions should be adopted and the SGAT definitions rejected. In fact, WorldCom's only justification for its position is that its definition section "contains many definitions that are omitted in Qwest's SGAT." WorldCom at 7, lines 18-19. WorldCom does not describe or even list those "omitted" definitions; indeed, WorldCom's proposal does not compare WorldCom's proposed language with the language of the SGAT, so there is no efficient way of knowing how the two compare. WorldCom should not be allowed to simply insert the definition section from its "model interconnection agreement" into these proceedings without any explanation or support."

Resolution

109. WorldCom suggested changes for Section 4.39 were accepted. Other suggested changes were rejected.

[48] Qwest Rebuttal pgs 23-25

SGAT Section 5 – Terms and Conditions

Section 5.1

a) AT&T Position [49]

110. Section 5.1.1 requires "best efforts" of the parties to comply with the "Implementation Schedule". AT&T also commented on the Implementation Schedule regarding section 3 of the SGAT. AT&T has the same concerns about this section.

b) Covad Position[50]

111. Covad suggests that Section 5.1.3 is unclear and confusing.

c) Qwest Position[51]

112. Regarding WorldCom's position, Qwest said: WorldCom has juxtaposed its WHEREAS clauses discussed above with Section 5.1 of the SGAT. Since these provisions cover different subjects and WorldCom has given no justification as to why the SGAT provisions should not be accepted, Section 5.1 of the SGAT should be retained.

113. Qwest does not directly address AT&T comments but it is noted that Qwest addressed a similar if not identical concern in Section 3.

Resolution

114. No changes were made to Section 5.1 of the November 30, 2001 SGAT.

SGAT Section 5.1.1

a) WorldCom Position[52]

115. WorldCom wants Section 5.1.1 deleted "for the reasons stated earlier regarding Qwest's Implementation Schedule."

Resolution

116. WorldCom's suggestion was rejected. Section 5.1.1 remains unchanged.

[49] AT&T Initial Comments pg 20
[50] Covad - *Zulevic testimony* pg 16
[51] Qwest Rebuttal Page 25
[52] WorldCom Supplemental pg 16

SGAT Section 5.1.3

a) AT&T Position[53]

117. Qwest's proposed language at section 5.1.3 ("use any service related to" and "use any of the services provided in") both relate to "this Agreement". While this language is written to be reciprocal, AT&T states that it imposes a restriction only on the CLEC since the SGAT is primarily a contract about what Qwest will provide to the CLEC. AT&T wants a similar restriction placed on Qwest.

118. In addition, Qwest seeks the right to discontinue services in its discretion in this provision. That is unacceptable to AT&T.

119. AT&T proposes to amend the language to read:

> 5.1.3 Neither Party shall use any service related to or use any of the services provided in this Agreement in any manner that interferes with other persons in the use of their service, prevents other persons from using their service, or otherwise impairs the quality of service to other carriers or to either Party's end users. In addition, neither party's provision or use of services shall interfere in any way with the services related to or provided under this Agreement. ~~Each Party may discontinue or refuse service if the other Party violates this provision.~~ Upon a~~such~~ violation of this Section 5.1.3, either Party shall provide the other Party notice of such violation at the earliest practicable time and the Parties shall work cooperatively and in good faith to resolve their differences.

b) Qwest Position[54]

120. Qwest does not directly address AT&T's comments but it is noted that Qwest addressed a similar if not identical concern in Wcom's proposed new Section 3.

Resolution

121. AT&T suggestions were rejected. No changes were made to Section 5.1.3

Section 5.1.4

a) AT&T Position[55]

122. The purpose of the language in section 5.1.4 is unclear. When a CLEC provides a service to an end user customer through the use of wholesale services provided by Qwest, the CLEC should have recourse against Qwest for its failure to perform. The

[53] AT&T Initial Comments pg 21
[54] Qwest Rebuttal Page 25
[55] AT&T Initial Comments, pgs 21-22

additional sentence is intended to make clear that right remains. AT&T's proposed changes as follows:

> 5.1.4 Each Party is solely responsible for the services it provides to its end users and to other Telecommunications Carriers. This provision is not intended to limit the liability of either Party for its failure to perform under this Agreement.

b) Qwest Position

123. Qwest did not address this issue.

Resolution

124. No change was made to this section. Since Qwest did not comment, it must be assumed that they concur with AT&T's recommended wording, and should make the change proposed in order to be truly compliant with this section.

Section 5.1.6

a) AT&T Position[56]

125. Qwest attempts to give the appearance that it will not be properly compensated for the services it provides and may seek recovery of costs. There are two problems with this. First, the point of entering into a contract is to spell out rights and obligations so that the parties know what to expect, including the pricing.

126. Second, the FCC's section 271 orders have made clear that Qwest must demonstrate that it has "concrete and specific legal obligations" to provide the checklist items.[57]

127. AT&T concludes that the SGAT must have an affirmative statement of the pricing standards applicable to this Agreement to ensure that Qwest is obligated in the SGAT to adhere to such standards and Qwest must be bound to the prices in the SGAT. AT&T suggests the following:

> 5.1.6 Nothing in this Agreement shall prevent either Party from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this

[56] AT&T Initial Comments pgs 22-23

[57] *Application of BellSouth Corporation et al. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998), ¶ 54 ("*BellSouth Louisiana II Order*").

Agreement. Notwithstanding the foregoing, Qwest shall not assess any charges against CLEC for services, facilities, unbundled network elements, ancillary service and other related work or services covered by this Agreement, unless the charges are expressly provided for in this Agreement.

All services and capabilities currently provided hereunder (including resold telecommunications services, unbundled network elements, UNE combinations and ancillary services) and all new and additional services or unbundled network elements to be provided hereunder, shall be priced in accordance with all applicable provisions of the Act and the rules and orders of the Federal Communications Commission and orders of the Commission.

b) Qwest Position

128. Qwest did not address this issue.

Resolution

129. AT&T suggested additions were not shown in the November 30, 2001 SGAT, Section 5.1.6. Since Qwest did not comment, it is assumed they concur, and should insert the proposed wording in order to be fully compliant with this section.

Section 5.2 – Term of Agreement

Section 5.2.1

a) WorldCom Position[58]

130. Qwest proposes revision of Section 5.2.1. in part because the language derives from a template negotiated Agreement, not an SGAT. The language should instead state:

> 5.2.1 This Agreement shall become effective upon the date set forth in Section 1 pursuant to Section 252 of the Act. This Agreement is binding upon the Parties for a term of two years and shall terminate on_____.

b) AT&T Position[59]

131. Section 5.2.2.1 of the SGAT gives the impression that the SGAT can only be replaced at the end of the two-year term. CLECs should have the ability to replace some or all of the terms of an interconnection agreement during the term to insure that the

[58] WorldCom Comparison of Language, MWS-1, pg 9
[59] Pg 23

most favorable terms are available to all CLECs at all times and to avoid discriminatory treatment. This is consistent with the rights CLECs have under section 252(i) of the Act.

132. AT&T has proposed changes below to address this concern:

> 5.2.2.1 Prior to the conclusion of the term specified above, CLEC may obtain Interconnection services under the terms and conditions of a then-existing SGAT or agreement to become effective at the conclusion of the term or prior to the conclusion of the term if CLEC so chooses.

c) **Qwest Position** [60]

133. Regarding the AT&T position. AT&T's suggested revision is a modification of Section 5.2.2.1 that permits the CLECs to replace the SGAT as an interconnection agreement prior to the end of the two-year term. Qwest agrees with AT&T's suggestion and has stricken SGAT Section 5.2.2.1 accordingly.

134. Regarding the WorldCom proposal, Qwest states: "WorldCom does not offer any testimony regarding Section 5.2 in its comparison of Qwest and WorldCom language it provides (without comment) an entirely new section entitled "Section 3. Term and Termination." WorldCom's proposed language is unacceptable for a number of reasons."

135. Qwest then provides a section-by-section statement of position based on the WorldCom proposal. Given that the WorldCom proposal does not specifically address this section of the SGAT but merely offers an alternative agreement with no supporting testimony, it is not discussed in this report.

Resolution

136. Suggested changes were rejected. Section 5.2.2.1 does have one modification which is the addition of the wording [two (2) year] prior to term in the last sentence.

Section 5.3 – Proof of Authorization

a) **AT&T Position**[61]

137. Section 5.3 of the SGAT purports to identify the exclusive means by which customer authorization is obtained and seems to do so to the exclusion of other methods that may be permitted or required by law.

138. AT&T argues it is not necessary or appropriate to add liability provisions in an SGAT or interconnection agreement for unauthorized changes where the penalty is

[60] Qwest Rebuttal pgs 25-28
[61] AT&T Initial Comments pgs 23-24

paid between carriers. The existing regulatory requirements should govern in this area. Finally, the state and federal rules regarding customer authorization may change at any time.

139. The change recommended by AT&T is as follows:

> 5.3.1 ~~Where so indicated in specific sections of this Agreement,~~ eEach Party shall be responsible for obtaining and having in its possession Proof of Authorization ("POA") as required by applicable federal and state law, as amended from time to time. ~~POA shall consist of documentation of the end user's selection of its local service provider. Such selection may be obtained in the following ways:~~
>
> ~~5.3.1.1 The end user's written Letter of Authorization.~~
>
> ~~5.3.1.2 The end user's electronic authorization by use of an 8XX number.~~
>
> ~~5.3.1.3 The end user's oral authorization verified by an independent third party (with third party verification as POA).~~
>
> ~~5.3.2 The Parties shall make POAs available to each other upon request. in accordance with applicable laws and rules. A charge of $100.00 will be assessed if the POA cannot be provided supporting the change in service provider. If there is a conflict between the end user designation and the other Party's written evidence of its authority, the Parties shall honor the designation of the end user and change the end user back to the previous service provider.~~

b) WorldCom Position[62]

140. WorldCom states that Section 5.3 should be deleted in its entirety because the proof of authorization rules are already addressed by the FCC, set forth in 47 CFR Section 64.100 et seq. Further, WorldCom states that the proposed imposition of a $100 charge is not cost-based or contained in Exhibit A and not required by 47 CFR 64.100.

141. In the alternative, Section 5.3 should simply state that:

> The Parties agree to abide by the FCC rules regarding Changes in subscriber carrier selections set forth in 47 CFR Section 64.100 et seq. An executing carrier shall not verify the submission of a change in a subscriber's selection of a provider of telecommunication service received from a submitting carrier. For an executing carrier, compliance with the procedures prescribed in 47 CFR Section 64.100 et seq. shall be defined as prompt

[62] WorldCom Supplemental pg 16

execution, without any unreasonable delay, of changes that have been verified by a submitting carrier.

c) Qwest Position[63]

142. Qwest first addresses AT&T's suggestions and comments. Qwest intention was to mirror the FCC provisions. AT&T points out that the FCC provisions already address Proof of Authorization and offers counter language.[64] Other FCC rules address local exchange service and carrier liability.[65]

143. Qwest agrees to AT&T's proposed language with the addition of the change in 5.3.2 to give the intent of AT&T's language.

> 5.3.1 ~~Where so indicated in specific sections of this Agreement, e~~Each Party shall be responsible for obtaining and having in its possession Proof of Authorization ("POA") as required by applicable federal and state law, as amended from time to time. ~~POA shall consist of documentation of the end user's selection of its local service provider. Such selection may be obtained in the following ways:~~
>
> > ~~5.3.1.1 The end user's electronic or written Letter of Authorization.~~
> >
> > ~~5.3.1.2 The end user's electronic authorization by use of an 8XX number.~~
> >
> > ~~5.3.1.3 The end user's oral authorization verified by an independent third party (with third party verification as POA).~~
>
> ~~5.3.2 The Parties shall make POAs available to each other upon request. in accordance with applicable laws and rules. A charge of $100.00 will be assessed if the POA cannot be provided supporting the change in service provider. If there is a conflict between the end user designation and the other Party's written evidence of its authority, the Parties shall honor the designation of the end user and change the end user back to the previous service provider.~~
>
> 5.3.2 The Parties shall make POAs available to each other upon request in accordance with all applicable laws and rules and shall be subject to any penalties contained therein.

[63] Qwest Rebuttal pgs 29-30
[64] FCC rules 47.C.F.R. 64.1120 and 64.1140
[65] FCC rules 64.1120 and 64.1140 respectively.

144. WorldCom also objects on the same grounds. By accepting AT&T's language, Qwest believes they have addressed WorldCom's concerns as well. WorldCom also objects to proposed penalties. The FCC rules that WorldCom relies upon in their testimony provide for penalties. If AT&T's language is used, any FCC rules regarding penalties would apply to all parties.

Resolution

145. The November 30,2001 SGAT makes no changes (including those shown in the Qwest position above). However, Qwest has stated that it accepts AT&T's proposed change, with the addition of it's proposed phrase in subsection 5.3.2, and should make these changes in the SGAT in order to be compliant.

Section 5.4 – Payment

a) Covad Position[66]

146. Section 5.4 describes the terms for payment for services provided under the SGAT. Covad demands that a provision be included that explicitly permits CLECs to challenge the amount charged and to require the provision by Qwest of all back up documentation in order to permit the resolution of the billing dispute. Additionally, the SGAT should be revised to make clear that a CLEC need not pay any disputed amounts pending resolution of that billing dispute, nor may Qwest assess any penalties, late payment charges, or interest on such disputed amounts.

147. Any billing issues successfully disputed by a CLEC should be resolved on the basis of a cash payment, not the issuance of a credit to the CLEC. This ensures that Qwest and CLECs are treated in the same manner in the event of a billing dispute – via a cash payment.

148. The SGAT also should be revised to eliminate any ability on the part of Qwest to condition the provision of service under the SGAT on payment of any and all amounts owed by a CLEC to Qwest or on a deposit made by a CLEC because the parties' business and contractual relationships may be memorialized at places other than the SGAT.

149. Covad objects to the requirement that CLECs provide a deposit to Qwest prior to the resumption of service under the SGAT. To the extent that a deposit may be required, Covad has several unanswered questions regarding whether a deposit always will be required; under what circumstances will a deposit be required; how the amount of the deposit will be determined; where the deposit will be held; the amount and terms under which interest on the deposit shall accrue; and the circumstances under which the deposit requirement will be augmented, decreased or terminated.

[66] Covad - Zulevic testimony pg 16

b) Qwest Position[67]

150. Regarding the entire 5.4 Section, Qwest notes that WorldCom and AT&T both ignore the fact that this section is reciprocal. They also note that WorldCom has provided no justification for its proposal.

Resolution

151. See individual subsections of 5.4.

Section 5.4.2

a) **AT&T Position**[68]

152. Under section 5.4.2, Qwest seeks the right to discontinue the processing of CLEC orders if CLEC fails to make full payment within a certain period of time.

153. This provides Qwest with a very strong right that, if misused, would substantially damage CLECs. AT&T proposes two changes of significance to this language. First, the CLEC should have more time. AT&T has changed the time period from thirty days to ninety days. Second, Qwest should demonstrate to the Commission that it is appropriate for Qwest to take such action. CLECs should also have the ability to pursue other remedies.

154. AT&T proposed language as follows:

> 5.4.2 Qwest may discontinue processing orders for the failure of CLEC to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the services provided under this Agreement within ninety (90) ~~thirty (30)~~ days of the due date on CLEC's bill. Qwest will notify CLEC in writing at least ten (10) business days prior to discontinuing the processing of orders. If Qwest does not refuse to accept additional orders on the date specified in the ten (10) days notice, and CLEC's non-compliance continues, Qwest shall provide another notice ten (10) business days prior to refusing to accept additional orders. ~~nothing contained herein shall preclude Qwest's right to refuse to accept additional orders from the non-complying CLEC without further notice.~~ For order processing to resume, CLEC will be required to make full payment of all past and current charges incurred under this Agreement. Additionally, Qwest may require a deposit (or additional deposit) from CLEC, pursuant to this section. If CLEC contests action taken by Qwest under this Section 5.4.2, Qwest must seek approval from the Commission to take such action and Qwest shall continue processing orders until it has obtained such

[67] Qwest rebuttal pg 30
[68] AT&T Initial Comments pgs 24-27

approval. In addition to other remedies that may be available at law or equity, CLEC reserves the right to seek equitable relief, including injunctive relief and specific performance.

b) Qwest Position[69]

155. AT&T proposes to extend the time before Qwest can discontinue processing orders when CLECs fail to make payments from 30 to 90 days. Qwest disagrees with AT&T's proposal. Under Qwest's proposal, an invoice is not due and payable until 30 days after its date and Qwest cannot take action until 30 days from then. Since Qwest rendered its services in the month before the date of the invoice under its own proposal, it cannot take action until nearly three months after it actually provided services. Secondly, AT&T would require Qwest to seek permission from the Commission prior to discontinuing processing of orders. Qwest does notify the Commission before taking action. However, permitting a CLEC to continue to incur debts for months before Qwest can take appropriate action to protect itself is not reasonable.

156. Furthermore, if the CLEC has valid, good faith disputes about its bill, it can utilize the dispute resolution process set forth in Section 5.4.4 of the SGAT.

157. Qwest does not object to AT&T's addition of charges incurred "under this Agreement" or its last sentence, which allows the CLEC to take other legal actions.

158. Qwest revised its wording is as follows:

> 5.4.2 Qwest may discontinue processing orders for the failure of CLEC to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the services provided under this Agreement within thirty (30) days of the due date on CLEC's bill. Qwest will notify CLEC in writing at least ten (10) days prior to discontinuing the processing of orders. If Qwest does not refuse to accept additional orders on the date specified in the ten (10) days notice, and CLEC's non-compliance continues, nothing contained herein shall preclude Qwest's right to refuse to accept additional orders from the non-complying CLEC without further notice. For order processing to resume, CLEC will be required to make full payment of all past and current charges under this Agreement. Additionally, Qwest may require a deposit (or additional deposit) from CLEC, pursuant to this section. In addition to other remedies that may be available at law or equity, CLEC reserves the right to seek equitable relief, including injunctive relief and specific performance.

[69] Qwest Rebuttal pgs31-32

Resolution

159. The November 30 SGAT reads as shown above in the Qwest position but does not include the last sentence, as suggested by AT&T. Qwest should add this last sentence in order to be compliant with this SGAT section.

Section 5.4.3

a) AT&T Position[70]

160. Qwest seeks the right to disconnect a CLEC if the CLEC fails to make full payment within a certain period of time. This provision is very similar to section 5.4.2, but this is an even stronger right for Qwest. AT&T has proposed changes to section 5.4.3 that are similar to the changes proposed for section 5.4.2.

> 5.4.3 Qwest may disconnect any and all services for failure by CLEC to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the services provided under this Agreement within one hundred and twenty (120) ~~sixty (60)~~ days of the due date on CLEC's bill. CLEC will pay the Tariff charge, less the wholesale discount, required to reconnect each resold end user line disconnected pursuant to this paragraph. Qwest will notify CLEC in writing at least ten (10) business days prior to disconnection of the service(s). In case of such disconnection, all applicable charges, including termination charges, shall become due. If Qwest does not disconnect CLEC's service(s) on the date specified in the ten (10) day notice, and CLEC's noncompliance continues, Qwest shall provide another notice ten (10) business days prior to disconnection of the service(s). ~~nothing contained herein shall preclude Qwest's right to disconnect any or all services of the non-complying CLEC without further notice.~~ For reconnection of service to occur, CLEC will be required to make full payment of all past and current charges incurred under this Agreement. Additionally, Qwest will request a deposit (or additional deposit) from CLEC, pursuant to this section. Qwest agrees, however, that the application of this provision will be suspended for the initial three (3) billing cycles of this Agreement and will not apply to amounts billed during those three (3) cycles. If CLEC contests action taken by Qwest under this Section 5.4.3, Qwest must seek approval from the Commission to take such action and Qwest shall refrain from disconnecting CLEC until it has obtained such approval. In addition to other remedies that may be available at law or equity,

[70] AT&T Initial Comments, pgs 25-26

CLEC reserves the right to seek equitable relief, including injunctive relief and specific performance.

b) Qwest Position[71]

161. AT&T proposes to add another 60 days before complete disconnection. AT&T's proposal could cost Qwest a six-month revenue loss. AT&T would increase Qwest's financial exposure by requiring a second ten-day notice if Qwest has not disconnected within ten days of the date for disconnection. AT&T suggests that Qwest must obtain Commission approval before disconnection. As previously noted, Qwest does notify the Commission before taking action. As noted above, the CLEC with valid disputes regarding its bill, can seek resolution under Section 5.4.4. Also, in order to avoid disruption to its end-users' service, a CLEC agrees in Section 5.4.9 of the SGAT to give its customers notice of the pending disconnection so that they can make other arrangements for service.

162. Qwest does not object to the addition of the words "under this Agreement" or the addition of the last sentence. Qwest does object to AT&T's attempt to have the wholesale discount applied to the reconnection charge.

163. Qwest proposes the following:

> 5.4.3 Qwest may disconnect any and all services for failure by CLEC to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the services provided under this Agreement within sixty (60) days of the due date on CLEC's bill. CLEC will pay the Tariff charge required to reconnect each resold end user line disconnected pursuant to this paragraph. Qwest will notify CLEC in writing at least ten (10) business days prior to disconnection of the service(s). In case of such disconnection, all applicable charges, including termination charges, shall become due. If Qwest does not disconnect CLEC's service(s) on the date specified in the ten- (10) day notice, and CLEC's noncompliance continues, nothing contained herein shall preclude Qwest's right to disconnect any or all services of the non-complying CLEC without further notice. For reconnection of service to occur, CLEC will be required to make full payment of all past and current charges under this Agreement. Additionally, Qwest will request a deposit (or additional deposit) from CLEC, pursuant to this section. Qwest agrees, however, that the application of this provision will be suspended for the initial three (3) billing cycles of this Agreement and will not apply to amounts billed during those three (3) cycles. In addition to other remedies that may be available at law or equity, CLEC reserves the right to

[71] Qwest Rebuttal pgs 32-33

seek equitable relief, including injunctive relief and specific performance.

Resolution

164. Actual wording in the November 30, 2001 SGAT differs from the above (in that it does not include the phrase "under this agreement" in the sentence concerning reconnection), and the last sentence in the Qwest position is not included.

165. Qwest should add the language to which it agreed in order to be complaint with this SGAT section.

Section 5.4.6

a) AT&T Position[72]

166. AT&T proposes a clarifying amendment to section 5.4.6 below. Payment in full should always be qualified by the right of a CLEC to withhold payment of disputed amounts without being penalized while the dispute is being resolved.

> 5.4.6 Interest will be paid on cash deposits at the rate applying to deposits under applicable Commission rules, regulations, or Tariffs. Cash deposits and accrued interest will be credited to CLEC's account or refunded, as appropriate, upon the earlier of the two year term or the establishment of satisfactory credit with Qwest, which will generally be one full year of timely payments in full by CLEC, less any disputed amounts. The fact that a deposit has been made does not relieve CLEC from any requirements of this Agreement.

b) Qwest Position[73]

167. AT&T's proposal to insert "less disputed amounts" in Section 5.4.6 would mean that these amounts could not be taken into account when determining deposit requirements. Qwest rejects this proposal.

Resolution

168. No changes were made to SGAT Section 5.4.6

[72] AT&T Initial Comments pg 26
[73] Qwest Rebuttal pg 24

Section 5.5 – Taxes

a) AT&T Position[74]

169. The original Qwest SGAT language required that virtually all taxes be paid by the "purchaser". AT&T attempts to make the language more balanced and requires that the party who is responsible under applicable law pay any particular tax.

> ~~5.5.1 Each Party purchasing services hereunder shall pay or otherwise be responsible for all~~ Any federal, state, or local sales, use, excise, gross receipts, transaction or similar taxes, fees or surcharges resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party. ~~levied against or upon such purchasing Party (or the providing Party when such providing Party is permitted to pass along to the purchasing Party such taxes, fees or surcharges),~~ Each Party is responsible for ~~except for~~ any tax on ~~either~~ its ~~Party's~~ corporate existence, status or income. Whenever possible, these amounts shall be billed as a separate item on the invoice. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Until such time as a resale tax exemption certificate is provided, no exemptions will be applied.

b) WorldCom Position[75]

170. WorldCom submitted the following text suggesting it be used as a revised Section 5.5:

> 5.5 Taxes
>
> 5.5.1 Each Party purchasing services hereunder shall pay or otherwise be responsible for all federal, state, or local sales, use, excise, gross receipts, transaction or similar taxes, fees or surcharges levied against or upon such purchasing Party by law (or the providing Party when such providing Party is permitted to pass along to the purchasing Party such taxes, fees or surcharges), for the purchase of the services, except for any tax on either Party's corporate existence, status or net income. Whenever possible,

[74] AT&T Initial Comments pg 27
[75] WorldCom Supplemental pg 17

these amounts shall be billed as a separate item on the invoice. To the extent a sale is claimed to be for resale ~~tax~~ exemption, the purchasing Party shall furnish the providing Party a proper resale ~~tax~~ exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale ~~tax~~ exemption. Until such time as a resale ~~tax~~ exemption certificate is provided, no exemptions will be applied.

c) Qwest Position[76]

171. AT&T's contention that this provision is "one sided" because it requires that virtually all taxes be paid by the purchaser is not correct. Section 5.5 clearly states that the Party purchasing services under the Agreement shall pay or be responsible for any applicable taxes "levied against or upon such purchasing Party". AT&T's general concern about CLECs paying for "virtually all taxes" is misplaced.

172. Qwest agrees with AT&T that the intent of Section 5.5 is to require the party who is responsible under applicable law or tariff to pay any given tax. AT&T's proposal appears to be a different way of stating what Qwest's provision already provides and is largely acceptable. Qwest modifies AT&T's proposal to clarify that each of the Parties has the right to pass tax liability to the purchaser of services where it is legally entitled to do so.

173. AT&T also proposes language that would clarify that "Each Party is responsible for any tax on its corporate existence, status, or income," and Qwest agrees with this clarification.

174. Qwest next addresses the WorldCom proposed language changes. WorldCom provides neither commentary nor a redline of Qwest's SGAT 5.5, but attaches a "Section 26. Taxes" which is evidently WorldCom's proposed replacement of SGAT 5.5. WorldCom provides no rationale for its proposal, nor does it suggest any respects in which the Qwest SGAT 5.5 is inadequate.

175. The concepts that WorldCom seeks to incorporate are already incorporated by the Qwest and AT&T versions of SGAT 5.5. Qwest has incorporated, with slight modification, WorldCom's suggestion that the SGAT also address the situation in which one Party seeks to contest the application of a tax collected by the other Party. Under the proposed modification to Section 5.5.1, each Party agrees to cooperate with the other Party when such a contest occurs, and to reimburse the other Party in appropriate circumstances.

Any federal, state, or local sales, use, excise, gross receipts, transaction or similar taxes, fees or surcharges resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon

[76] Qwest Rebuttal pg 34

the other Party. However, where the selling Party is permitted by law to collect such taxes, fees or surcharges from the purchasing Party, such taxes, fees or surcharges shall be borne by the Party purchasing the services. Each Party is responsible for any tax on its corporate existence, status or income. Whenever possible, these amounts shall be billed as a separate item on the invoice. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Until such time as a resale tax exemption certificate is provided, no exemptions will be applied. If either Party (the "contesting Party") contests the application of any tax collected by the other Party (the "collecting Party"), the collecting Party shall reasonably cooperate in good faith with the Contesting Party's challenge, provided that the Contesting Party pays any costs incurred by the collecting Party. The Contesting Party is entitled to the benefit of any refund or recovery resulting from the contest, provided that the Contesting Party is liable for and has paid the tax contested.

Resolution

176. Wording in the SGAT appears to have reverted to original language and is as follows:

> 5.5.1 Each Party purchasing services hereunder shall pay or otherwise be responsible for all federal, state, or local sales, use, excise, gross receipts, transaction or similar taxes, fees or surcharges levied against or upon such purchasing Party (or the providing Party when such providing Party is permitted to pass along to the purchasing Party such taxes, fees or surcharges), except for any tax on either Party's corporate existence, status or income. Whenever possible, these amounts shall be billed as a separate item on the invoice. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Until such time as a resale tax exemption certificate is provided, no exemptions will be applied.

177. Qwest should replace the original language, above, with the language proposed, and accepted on May 15, 2001, in order to be complaint with this SGAT section.

Section 5.6 – Insurance

a) AT&T Position[77]

178. AT&T made several proposed changes to the insurance language in section 5.6 of the SGAT. These changes are intended mainly to clarify, rather than substantively change, the coverage required.

179. The changes in section 5.6.1 and 5.6.2 are meant to provide further clarification.

> 5.6.1 CLEC shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain the insurance coverage listed below with insurers, other than CLEC's affiliated captive insurance company, having a "Best's" rating of B+XIII.
>
> 5.6.1.1 Workers' Compensation with statutory limits as required in the state of operation and Employers' Liability insurance with limits of not less than $100,000 each accident.
>
> 5.6.1.2 Commercial General Liability insurance covering claims for bodily injury, death, personal injury or property damage occurring or arising out of the use or occupancy of the premises, including coverage for independent contractor's protection (required if any work will be subcontracted), premises-operations, products and/or completed operations and contractual liability with respect to the liability assumed by CLEC hereunder. The limits of insurance shall not be less than $1,000,000 each occurrence and $2,000,000 general aggregate limit.
>
> 5.6.1.3 Business~~Comprehensive~~ automobile liability insurance covering the ownership, operation and maintenance of all owned, non-owned and hired motor vehicles with limits of not less than $1,000,000 per occurrence for bodily injury and property damage.
>
> 5.6.1.4 Umbrella/Excess Liability insurance in an amount of $10,000,000 excess of Commercial General Liability insurance specified above. These limits may be obtained through any combination of primary and excess or umbrella liability insurance so long as the total limit is $11,000,000.
>
> 5.6.1.5 "All Risk" Property coverage on a full replacement cost basis insuring all of CLEC personal property situated

[77] AT&T Initial Comments pgs 27-28

on or within the premises. CLEC may elect to purchase business interruption and contingent business interruption insurance. ~~Qwest has no liability for loss of profit or revenues should an interruption of service occur.~~

5.6.2 CLEC shall provide certificate(s) of insurance evidencing coverage, and ~~annually~~ thereafter ~~within ten (10) calendar days of~~prior to the renewal of any coverage maintained pursuant to this Section. Such certificates shall (1) name Qwest as an additional insured under commercial general liability coverage as respects liability arising from CLEC's operations for which CLEC has legally assumed responsibility herein ~~Qwest's interests~~; (2) provide Qwest thirty (30) calendar days prior written notice of cancellation of~~,~~ or material change to~~or exclusions in~~ the policy(s) to which certificate(s) relate; (3) indicate that to the extent Qwest is an additional insured, coverage is primary and not excess of, or contributory with, any other valid and collectible insurance purchased by Qwest; and (4) acknowledge~~provide~~ severability of interest/cross liability coverage for those policies under which Qwest is an additional insured.

b) WorldCom Position[78]

180. WorldCom states that Section 5.6 should be reciprocal because the CLEC needs to be assured that Qwest also has insurance in place. Further, Qwest's limits for excess Umbrella insurance are unnecessarily high and WorldCom proposes revised limits. The last two sentences of section 5.6.1.5 should be deleted. The statement that CLECs may elect to purchase business interruption insurance lends nothing to the Agreement and should be deleted. The statement that Qwest has no liability for loss of profit due to an interruption of service is limitation of liability language.

181. WorldCom suggests this section should be revised as follows:

5.6 Insurance

5.6.1 Each Party ~~CLEC~~ shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain the insurance coverage listed below with insurers having a "Best's" rating of B+XIII.

5.6.1.1 Workers' Compensation with statutory limits as required in the state of operation and Employers' Liability insurance with limits of not less than $100,000 each

[78] WorldCom Supplemental pg 17

accident.

5.6.1.2 Commercial General Liability insurance covering claims for bodily injury, death, personal injury or property damage occurring or arising out of the use or occupancy of the premises, including coverage for independent contractor's protection (required if any work will be subcontracted), premises-operations, products and/or completed operations and contractual liability with respect to the liability assumed by ~~CLEC~~ each Party hereunder. The limits of insurance shall not be less than $1,000,000 each occurrence and $2,000,000 general aggregate limit.

5.6.1.3 Comprehensive automobile liability insurance covering the ownership, operation and maintenance of all owned, non-owned and hired motor vehicles with limits of not less than $1,000,000 per occurrence for bodily injury and property damage.

5.6.1.4 Umbrella/Excess Liability insurance in an amount of ~~$10,000,000~~ $4,000,000 excess of Commercial General Liability insurance specified above. These limits may be obtained through any combination of primary and excess or umbrella liability insurance so long as the total limit is ~~$11,000,000~~ $5,000,000.

5.6.1.5 "All Risk" Property coverage on a full replacement cost basis insuring all of ~~CLEC~~ a Party's personal property situated on or within the premises. ~~CLEC may elect to purchase business interruption and contingent business interruption insurance. Qwest has no liability for loss of profit or revenues should an interruption of service occur.~~

5.6.2 ~~CLEC~~ Each Party shall provide certificate(s) of insurance evidencing coverage, and annually thereafter within ten (10) calendar days of renewal of any coverage maintained pursuant to this Section. Such certificates shall (1) name ~~Qwest~~ the other Party as an additional insured under commercial general liability coverage as respects ~~Qwest's~~ such other Party's interests; (2) provide ~~Qwest~~ the other Party thirty (30) calendar days prior written notice of cancellation of, material change or exclusions in the policy(s) to which certificate(s) relate; (3) indicate that coverage is primary and not excess of, or contributory with, any other valid and collectible insurance purchased by ~~Qwest~~ the other Party; and (4) provide severability of interest/cross liability coverage.

c) Qwest Position

182. AT&T states that its language is intended to make clear that a CLEC affiliate captive insurance company may be used to provide coverage. AT&T's proposed modification does not state this, so it cannot be accepted as written. Moreover, no general provision of the kind AT&T proposes will be acceptable because not all CLECs offer the financial resources that this provision presupposes.

183. In Section 5.6.1.3, AT&T suggests changing the word "Comprehensive" to "Business." Qwest agrees with this proposal.

184. In Section 5.6.1.5, AT&T struck the sentence excluding liability for loss of profit or business revenues for service interruption. Qwest concurs that this exclusion is addressed elsewhere in the Agreement (in the Limitation of Liability section, not the Indemnification section as AT&T states). Accordingly, Qwest proposes citing to the Limitation of Liability provision so that the source of the limitation is clear.

185. AT&T also proposes modifications of Section 5.6.2 which it states "provide further clarification." First, AT&T proposes a slight revision of the contract language regarding the date for providing a certificate of insurance; this revision is acceptable to Qwest. AT&T also suggests modification of the language naming Qwest as an additional insured, rather than stating that Qwest is an additional insured "as respects Qwest's interests". AT&T proposes that Qwest is an additional insured "as respects liability arising from CLEC's operations for which CLEC has legally assumed responsibility herein". This change is acceptable to Qwest.

186. Finally, AT&T suggests modification of Section 5.6.2, (3) and (4). These suggestions cannot be accepted as presented by AT&T. The obligations regarding primary insurance and severability of interest/cross liability insurance should not be limited to commercial general liability insurance, which is the only policy under which Qwest is a named additional insured. Qwest therefore proposes revision of the AT&T proposals with respect to Section 5.6.2, (3) and (4).

187. As revised, the insurance revisions would appear as follows:

> 5.6.1 CLEC shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain the insurance coverage listed below with insurers having a "Best's" rating of B+XIII.
>
> 5.6.1.1 Workers' Compensation with statutory limits as required in the state of operation and Employers' Liability insurance with limits of not less than $100,000 each accident.
>
> 5.6.1.2 Commercial General Liability insurance covering claims for bodily injury, death, personal injury or property damage occurring or arising out of the use or

occupancy of the Premises, including coverage for independent contractor's protection (required if any work will be subcontracted), Premises-operations, products and/or completed operations and contractual liability with respect to the liability assumed by CLEC hereunder. The limits of insurance shall not be less than $1,000,000 each occurrence and $2,000,000 general aggregate limit.

5.6.1.3 Business automobile liability insurance covering the ownership, operation and maintenance of all owned, non-owned and hired motor vehicles with limits of not less than $1,000,000 per occurrence for bodily injury and property damage.

5.6.1.4 Umbrella/Excess Liability insurance in an amount of $10,000,000 excess of Commercial General Liability insurance specified above. These limits may be obtained through any combination of primary and excess or umbrella liability insurance so long as the total limit is $11,000,000.

5.6.1.5 "All Risk" Property coverage on a full replacement cost basis insuring all of CLEC personal property situated on or within the Premises. CLEC may elect to purchase business interruption and contingent business interruption insurance. As provided in Section 5.8 of this Agreement, Qwest has no liability for loss of profit or revenues should an interruption of service occur.

5.6.2 CLEC shall provide certificate(s) of insurance evidencing coverage, and thereafter prior to the renewal of any coverage maintained pursuant to this Section. Such certificates shall (1) name Qwest as an additional insured under commercial general liability coverage as respects liability arising from CLEC's operations for which CLEC has legally assumed responsibility herein; (2) provide Qwest thirty (30) calendar days prior written notice of cancellation of, material change or exclusions in the policy(s) to which certificate(s) relate; (3) indicate that, to the extent Qwest is an additional insured, coverage is primary and not excess of, or contributory with, any other valid and collectible insurance purchased by Qwest; and (4) acknowledge severability of interest/cross liability coverage for those policies under which Qwest is an additional insured.

Resolution

188. None of the above changes, to all of which Qwest agreed, have been made in the November 30, 2001 version of the SGAT. (In particular, liability limits were not changed.) Qwest should make these changes in order to be compliant.

Section 5.7 – Force Majeure

a) AT&T Position[79]

189. AT&T believes "equipment failure" should be stricken from this clause.

> 5.7.1 Neither Party shall be liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence including, without limitation, acts of nature, acts of civil or military authority, government regulations, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, ~~equipment failure,~~ power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers (collectively, a "Force Majeure Event"). The Party affected by a Force Majeure Event shall give prompt notice to the other Party, shall be excused from performance of its obligations hereunder on a day to day basis to the extent those obligations are prevented by the Force Majeure Event, and shall use reasonable efforts to remove or mitigate the Force Majeure Event. In the event of a labor dispute or strike the Parties agree to provide service to each other at a level equivalent to the level they provide themselves.

b) Qwest Position[80]

190. AT&T suggests removing the term "equipment failure" from the list of events that make up a "Force Majeure Event". Qwest is willing to eliminate that term from Section 5.7 and revise the SGAT accordingly.

191. WorldCom suggests that the SGAT's Force Majeure provision should be replaced entirely with language from WorldCom's "model interconnection agreement". WorldCom does not explain why its language is preferable to the language already in the SGAT. WorldCom offers absolutely no comments on the SGAT language or WorldCom's proposed language. Qwest believes that, absent a specific, articulated reason, there is no reason to change the SGAT language.

[79] AT&T Initial Comments pg 29
[80] Qwest Rebuttal pgs 40-42

192. WorldCom's proposed language is insufficient. WorldCom removes many events from the list of actions constituting Force Majeure Events. AT&T does not think they should be removed from the SGAT.

193. The SGAT requires "prompt notice" of any delay that is due to a Force Majeure Event yet WorldCom's proposal contains no such requirement. The SGAT, therefore, provides more protection to the party whose performance is not affected by a Force Majeure Event. Further, WorldCom's proposal states that the due date for a party's performance will be extended if "there is an excused delay" in performance; however, WorldCom's proposal does not define the term "excused delay." Finally, WorldCom proposes removing the SGAT's language requiring the parties to provide service to each other at a level equivalent to the level they provide themselves in the event of a labor dispute or strike and replacing it with a requirement for the "delaying Party" to perform its obligations at a performance level no less than that which it uses for its own operations. WorldCom has offered no reasons to replace the specific SGAT language with its general language, and Qwest sees no reason to adopt the proposed replacement language. Notably, AT&T does not believe this part of the SGAT should be altered.

194. In sum, Qwest is willing to modify Section 5.7 of the SGAT as follows in accordance with AT&T's comments:

> 5.7.1 Neither Party shall be liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence including, without limitation, acts of nature, acts of civil or military authority, government regulations, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers (collectively, a "Force Majeure Event"). The Party affected by a Force Majeure Event shall give prompt notice to the other Party, shall be excused from performance of its obligations hereunder on a day to day basis to the extent those obligations are prevented by the Force Majeure Event, and shall use reasonable efforts to remove or mitigate the Force Majeure Event. In the event of a labor dispute or strike the Parties agree to provide service to each other at a level equivalent to the level they provide themselves.

Resolution

195. In the November 30, SGAT, "equipment failure" remains in section 5.7.1, although it is shown as removed in the above Qwest section. Qwest should remove this item in order to be compliant with this SGAT section.

Section 5.8 – Limitation of Liability

a) WorldCom Position[81]

196. WorldCom states that Section 5.8 should also be reciprocal and suggest adoption of their language found in exhibit MWS-1. WorldCom states that the SGAT is a commercial contract between carriers not similar to a tariff in terms of liability as suggested by Qwest.

197. WorldCom also states that Qwest's section 5.8.2 is unconscionable and should be replaced with WorldCom's proposed language.

198. WorldCom further states that the cap in Section 5.8.3. may be acceptable for an end user tariff but it is improper and inadequate in this context.

199. WorldCom further states that the exception in 5.8.4 is limited to only willful or intentional misconduct and is therefore, improper as it is too limiting.

200. WorldCom argues that the fraud provision is improper and any language dealing with fraud is more properly contained in WorldCom's 20.2 Revenue Protection language.

b) Covad Position[82]

201. This particular provision limits Qwest's liability to Covad for any Qwest failure of performance/Qwest breach of the SGAT to "the total amount that is or would have been charged to the other Party by such breaching Party for service(s) or function(s) not performed or improperly performed, including without limitation direct damages for loss of or damage to the CLEC's collocated equipment located within collocation space."

202. This provision is unfair and discriminates against CLECs by requiring them to give up in advance an entire category of damages caused by Qwest's breach of the SGAT. Specifically, unlike the "damages" Qwest may sustain when a CLEC fails to make payments under the SGAT, a CLEC incurs out of pocket losses, as well as damage to its reputation and goodwill and lost profits every time Qwest breaches its obligations under the SGAT.

c) Qwest Position

203. WorldCom provides no comments regarding, or redline of, Qwest's SGAT 5.8, but submits competing language titled "Section 12, Limitation of Liability." WorldCom's proposal excludes liability for consequential damages. WorldCom also proposes "[a] Party's lost revenue caused by the other Party's breach of this Agreement will not be considered consequential damages." This proposed language is inappropriate

[81] WorldCom Supplemental pg 19
[82] Covad - Zulevic testimony pg 18

and unacceptable. First, lost revenues are plainly not in the nature of direct damages, but are consequential or indirect damages. WorldCom provides no rationale at all for treating lost revenues as direct damages here.

204. WorldCom's proposal also is inconsistent with standard industry practices. For example, SBC's "SGAT" language in Texas and Oklahoma and Verizon's agreements in New York and Massachusetts exclude liability for lost revenues. As noted above, AT&T concurs that neither party should be liable for the lost revenues of the other.

205. WorldCom also proposes that, notwithstanding the exclusion of consequential damages, Qwest (but not the CLEC) should be liable for reasonably foreseeable damages resulting from the failure to provide or delay in providing services under the Agreement. Put another way, WorldCom proposes that liability for consequential damages be a unilateral obligation belonging only to the ILEC and not to the CLEC. Again, WorldCom provides no rationale for such a one-sided provision, which as noted above, is inconsistent with industry standards.

206. For these reasons, the proposed language presented by WorldCom cannot be accepted.

Resolution

207. No change was made to SGAT Section 5.8.

Sections 5.8.1-5.8.3

a) AT&T Position[83]

208. AT&T addresses these issues together. AT&T has stricken the exclusionary language in section 5.8.1 because it narrows liability so substantially as to potentially make this clause meaningless.

209. The exclusionary language in section 5.8.1 relates directly to section 5.8.3. In essence, section 5.8.3 states that instead of getting direct damages, the harmed party gets a proportionate amount of the price of the service when there is a failure.

210. A CLEC that is damaged by Qwest's provision of service (or failure to provision service) should not be limited in its recovery of damages by the price of the service. A CLEC will be damaged by Qwest's failures to perform and Qwest must be accountable.

211. To the extent that backsliding measures are put in place that require Qwest to make payments for certain failures to perform, the language in section 5.8.3 could limit the payout under the backsliding plan.

[83] AT&T Initial Comments Pgs 30-32

5.8.1 ~~Except for losses relating to or arising out of any act or omission in its performance of services or functions provided under this Agreement, e~~ Each Party shall be liable to the other for direct damages for any loss, defect or equipment failure including without limitation any penalty, reparation or liquidated damages assessed by the Commission or under a Commission-ordered agreement (including without limitation penalties or liquidated damages assessed as a result of cable cuts), resulting from the causing Party's conduct or the conduct of its agents or contractors.

5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. For purposes of this Section 5.8.2, amounts due and owing to CLEC, or CLECs as a group, pursuant to any backsliding plan applicable to this Agreement shall not be considered to be indirect, incidental, consequential, or special damages.

~~5.8.3 Except for indemnity obligations, or as otherwise set forth in this Section, each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance of services or functions provided under this Agreement, whether in contract or in tort, shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed, including without limitation direct damages for loss of or damaged to CLEC's collocated equipment located within the Collocation space.~~

b) Qwest Position

212. AT&T and WorldCom each propose modifications to Qwest's SGAT language for Section 5.8. The purpose of Section 5.8.3 is to capture the traditional tariff limitation that limits liability to the cost of services that were not rendered or were improperly rendered to the end user. AT&T expresses a concern that this limitation could mean that recovery is disproportionate to potential damages. AT&T has the ability to impose the same limits upon its own end users. Moreover, to the extent that AT&T may be contractually exposed to liability beyond the cost of providing service, AT&T is in the best position to identify that potential liability. If the changes AT&T proposes were adopted, AT&T would not have appropriate incentives to protect itself against potential liability to end users.

213. In order to clarify this limitation, Qwest has moved the basic limitation contained in Section 5.8.3 to 5.8.1 and deleted the language relating to liability for direct damages. For those losses not addressed by the basic limitation contained in the revised Section 5.8.1, Qwest proposes further clarification of the provision by means of an additional liability cap. All of the provisions of Section 5.8.1 are reciprocal.

214. Regarding the AT&T concern that Section 5.8 of Qwest's SGAT might limit Qwest's liability under a "backsliding" plan that requires Qwest to make payments for certain "failures to perform", AT&T acknowledges that this issue "may need to be revisited after the Commission adopts a backsliding plan." Unless and until such a plan is adopted, the language proposed by AT&T is premature and renders the limitation of liability provision unclear. AT&T's suggestion regarding Section 5.8.2 should not be adopted.

215. Qwest proposed the following changes:

> 5.8.1, Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed. Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises.

Section 5.8.2

216. Qwest also proposes that Section 5.8.2, the standard exclusion for consequential damages, remain unchanged:

> 5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result.

217. As noted above, the substance of Section 5.8.3 is moved to Section 5.8.1. However, the last clause, governing liability for direct damage to collocated equipment, is deleted for the sake of clarity and consistency.

Resolution

218. None of the changes to Subsections 5.8.1-5.8.3, proposed by Qwest, which address other parties concerns, have been incorporated in the November 30, 2001 SGAT Qwest should incorporate them to be compliant with this section.

Section 5.8.4

a) AT&T Position[84]

219. AT&T has proposed changes to section 5.8.4 that includes appropriate carve-outs to the limitation of liability. Qwest's liability/accountability under this SGAT is directly tied to Qwest's section 271 application because sufficiently high liability and accountability are the only way to continue to insure that Qwest will perform its contractual (and statutory) obligations once its section 271 application is approved.

> 5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence) or (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.

b) Qwest Comments[85]

220. Regarding AT&T's proposed revisions to Section 5.8.4, which provides an exception to the limitation of liability for willful or intentional misconduct, AT&T suggests that the exception be expanded to include gross negligence, not merely willful and intentional misconduct, and that it also include "bodily injury, death or damage to tangible real or tangible personal property caused by such Party's negligent act or omission or that of their [sic] respective agents, subcontractors or employees." AT&T's suggested modifications reflect a misunderstanding of the purpose of the exception. "Willful and intentional misconduct" is addressed because that is the standard exclusion contained in the Parties' tariffs. Qwest proposes that this language be revised to conform more closely to the tariff. By contrast, the exclusion of liability for gross negligence is inconsistent with most tariff exclusions.

221. AT&T's second proposed modification of Section 5.8.4 has the potential effect of altering State law. Section 5.8.2 excludes liability for consequential damages, an exclusion with which AT&T agrees. AT&T's proposed inclusion of liability for bodily injury or death or for damage to tangible property amounts to a contractual provision stating that these types of losses constitute "direct damages" under the SGAT, and that liability for these damages is not limited by Section 5.8.1. Moreover, AT&T has provided no basis for excluding such damages from the general limitations of Section 5.8.1.

[84] AT&T Initial Comments pgs 31-32
[85] Qwest Rebuttal pgs 44-45

222. As noted above, Qwest proposes that Section 5.8.4 be slightly modified to conform to existing tariff language:

> Nothing contained in this Section 5.8 shall limit either Party's liability to the other for willful misconduct.

Resolution

223. The actual language in the November 30, 2001 SGAT differs from the language immediately above and resembles original language as follows:

> 5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for willful **or intentional** misconduct.

224. Qwest should make the above change in order to be compliant with this section.

Section 5.8.5

a) Qwest Position

225. Qwest proposes that Section 5.8.5 be modified to clarify that the limitation of liability provisions are not intended to alter the Parties' obligations under the Agreement's payment provisions. This is a Qwest proposal, neither WorldCom nor AT&T offered specific comments on this section.

> 5.8.5Nothing contained in this Section 5.8 shall limit either Party's obligations of indemnification specified in Section 5.9 of this Agreement, nor shall this Section 5.8 limit a Party's liability for failing to make any payment due under this Agreement.

Resolution

226. Actual November 30 wording differs from above as follows:

> Nothing contained in this Section shall limit either Party's obligations of indemnification as specified in the indemnity Section of this Agreement.

227. Qwest should make the Proposed change in order to be compliant with this SGAT section.

Section 5.8.6

a) AT&T Position[86]

228. The AT&T proposed changes to section 5.8.6 are intended to make Qwest responsible for its conduct. With respect to fraud, Qwest only wants to be liable if Qwest's conduct is intentional or grossly negligent, placing the risk of other Qwest faults on the CLEC. There is no reason why a CLEC should bear the responsibility for fraud where Qwest is responsible, for whatever reason.

> 5.8.6 CLEC is liable for all fraud associated with service to its end-users and accounts. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless Qwest is responsible for such fraud, whether ~~is~~ the result of ~~any~~ intentional act of Qwest, ~~or~~ gross negligence of Qwest, or otherwise. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.

b) Qwest Position[87]

229. AT&T misunderstands this provision, which is intended to specify Qwest's duty to investigate fraud without altering the general limitations of liability set forth in Section 5.8.

230. Qwest proposes two changes to Section 5.8.6 in order to render the provision consistent with existing tariff provisions and to clarify the Parties' respective responsibilities for costs incurred:

> 5.8.6 CLEC is liable for all fraud associated with service to its end-users and accounts. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless such fraud is the result of any intentional act of Qwest. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction and sole cost of CLEC, take reasonable action to mitigate the fraud where such action is possible. [88]

[86] AT&T Initial Comments pg 32
[87] Qwest rebuttal pg 45
[88] Qwest Rebuttal pg 49

Resolution

231. November 30, 2001 SGAT wording differs slightly from both proposals and reads:

> 5.8.6 CLEC is liable for all fraud associated with service to its end users and accounts. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless such fraud is the result of any intentional act or gross negligence of Qwest. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.

232. Note inclusion of "gross negligence" in sentence 2.

Section 5.9 – Indemnity

233. AT&T and Qwest both addressed Section 5.9 in-depth in initial comments, rebuttal and supplemental testimony. It is not always clear what comments are meant to replace previous wording and what comments are additions. For that reason, section 5.9 provides a chronology showing all comments. This Section also uses a different layout to accommodate the series of comments. Rather than address all party's positions within a subsection, the report groups comments by company and document.

- AT&T Initial Comments- May 3, 2001
- Qwest Affidavit- May 11, 2001
- Qwest Errata Rebuttal Affidavit- May 15, 2001
- AT&T Supplemental response- May 25, 2001

a) AT&T Position – Supplemental Response[89]

234. AT&T's supplemental response to Qwest's supplemental filing takes the following position. In AT&T's initial comments filed on May 3, 2001, AT&T proposed changes to the language in Section 5.9 and its subsections. AT&T takes exception with Qwest's assertion that its proposed indemnification language is "standard." AT&T, and likely others, do not consider Qwest's indemnities standard.

235. The following is language that is generally in AT&T's interconnection agreements with Qwest:[90]

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[89] AT&T Supplemental pg 7

[90] This provision was taken from the Colorado interconnection agreement with Qwest. This provision (or a very similar provision) is contained in all of the AT&T Interconnection Agreements with Qwest. None of the AT&T/Qwest Interconnection Agreements contain the limitations on the indemnification duty that

12.1 Notwithstanding any limitations in remedies contained in this Agreement, each Party (the "Indemnifying Party") will indemnify and hold harmless the other Party ("Indemnified Party") from and against any loss, cost, claim, liability, damage and expense (including reasonable attorney's fees) to third parties, relating to or arising out of the libel, slander, invasion of privacy, personal injury or death, property damage, misappropriation of a name or likeness, negligence or willful misconduct by the Indemnifying Party, its employees, agents or contractors in the performance of this Agreement or the failure of the Indemnifying Party to perform its obligations under this Agreement. In addition, the Indemnifying Party will, to the extent of its obligations to indemnify hereunder, defend any action or suit brought by a third party against the Indemnified Party.[91]

12.2 The Indemnified Party will notify the Indemnifying Party promptly in writing of any written claim, lawsuit or demand by third parties for which the Indemnified Party alleges that the Indemnifying Party is responsible under this Section 12 and tender the defense of such claim, lawsuit or demand to the Indemnifying Party. Failure to so notify the Indemnifying Party shall not relieve the Indemnifying Party of any liability that the Indemnifying Party might have, except to the extent that such failure prejudices the Indemnifying Party's ability to defend such claim.

12.3 The Indemnified Party also will cooperate in every reasonable manner with the defense or settlement of such claim, demand or lawsuit. The Indemnifying Party shall keep the Indemnified Party reasonably and timely apprised of the status of the claim, demand or lawsuit. The Indemnified Party shall have the right to retain its own counsel, including in-house counsel, at its expense, and participate in, but not direct, the defense; provided, however, that if there are reasonable defenses in addition to those asserted by the Indemnifying Party, the Indemnified Party and its counsel may raise and direct such defenses, which shall be at the expense of the Indemnifying Party.

Qwest seeks to impose in the SGAT.

[91] Three of the AT&T/Qwest interconnection agreements (Arizona, South Dakota and Utah) have a provision here that addresses third party intellectual property as follows (or similar to the following):

> If, after the Party providing access under this Agreement gives written notice to the other Party pursuant to Section 5.1, the other Party fails to obtain a license or permission for access or use of Third Party Intellectual Property, the Party providing access shall have no indemnification obligation hereunder for any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the failure of the other Party to obtain such license or permission.

This language is not appropriate and should not be an issue today because of the FCC's *Intellectual Property Order* released on April 27, 2000. Please see AT&T's comments to Section 5.10 of the SGAT where AT&T explains the *Intellectual Property Order*.

12.4 The Indemnifying Party will not be liable under this Section 12 for settlements or compromises by the Indemnified Party of any claim, demand or lawsuit unless the Indemnifying Party has approved the settlement or compromise in advance or unless the defense of the claim, demand or lawsuit has been tendered to the Indemnifying Party in writing and the Indemnifying Party has failed to timely undertake the defense. In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party.

AT&T proposes that Qwest adopt the above indemnity provisions.

b) AT&T - Initial Position

236. It is a matter of making Qwest accountable for its conduct to insure performance and deter backsliding. The SGAT needs to have a collection of provisions dealing with liability, indemnification and liquidated damages with a level of exposure that is sufficient to incent Qwest to perform. That is the purpose behind all of AT&T's proposed changes to section 5.9.

~~5.9.1 With respect to third party claims, the Parties agree to indemnify each other as follows:~~

5.9.1.1 Except as otherwise provided in Section 5.10~~for claims made by end users of one Party against the other Party, which claims are based on defective or faulty services provided by the other Party to the one Party,~~ each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an "Indemnitee") from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (attorneys' fees, accounting fees, or other) whether suffered, made, instituted, or asserted by any other Party or person, for (i) invasion of privacy, (ii) personal injury to or death of any person or persons, or for loss, damage to, or destruction of property or the environment, whether or not owned by others, resulting from the indemnifying Party's performance, breach of applicable law, or status of its employees, agents and subcontractors,; or (iii) for breach of or failure to perform under this Agreement, regardless of the form of action, or (iv) for actual or alleged infringement of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now known or later developed, to the extent that such claim or action arises from

CLEC or CLEC's customer's use of the services provided under this Agreement.

Section 5.9.1.2[92]

237. Section 5.9.1.2 is confusingly worded, but seems to indicate that if, for example, a CLEC customer has a claim based on defective or faulty service that was ultimately provided by Qwest on its facilities, Qwest will not indemnify the CLEC unless Qwest's conduct is shown to be "intentional and malicious."

238. First, if Qwest provides faulty service, Qwest should be responsible. If a CLEC has to pay a claim to its customer because of Qwest's failure, Qwest should indemnify the CLEC. Second, it is very difficult to prove "intentional *and* malicious misconduct"

239. Qwest must be accountable and section 5.9.1.2 should be deleted.

~~5.9.1.2 Where the third party claim is made by (or through) an end user of one Party against the other Party, which claim is based on defective or faulty services provided by the other Party to the one Party, then there shall be no obligation of indemnity unless the act or omission giving rise to the defective or faulty services is shown to be intentional and malicious misconduct of the other Party.~~

Section 5.9.1.3[93]

240. Section 5.9.1.3 is confusingly worded. It is not clear what "based on the content of a transmission" means or why this carve-out is necessary.

~~5.9.1.3 If the claim is made by (or through) an end user and where a claim is in the nature of a claim for invasion of privacy, libel, slander, or other claim based on the content of a transmission, and it is made against a Party who is not the immediate provider of the Telecommunications Service to the end user (the indemnified provider), then in the absence of fault or neglect on the part of the indemnified provider, the Party who is the immediate seller of such Telecommunications Service shall indemnify, defend and hold harmless the indemnified provider from such claim.~~

Section 5.9.1.4[94]

241. The only function this section seems to perform is to further define when Qwest will not have liability for its failures that impact CLEC customers. Since section 5.9.1.4 deals directly with the previous sections AT&T has proposed deleting (sections 5.9.1.2 and 5.9.1.3) this section should be deleted as well.

[92] AT&T Initial Comments pg 34
[93] AT&T Initial Comments pg 34
[94] AT&T Initial Comments pg 34

~~5.9.1.4 For purposes of this Section, where the Parties have agreed to provision line sharing using a POTS splitter: "claims made by end users or customers of one Party against the other Party" refers to claims relating to the provision of DSL services made against the Party that provides voice services, or claims relating to the provision of voice service made against the Party that provides DSL services; and "immediate provider of the Telecommunications Service to the end user or customer" refers to the Party that provides DSL service for claims relating to DSL services, and to the Party that provides voice service for claims relating to voice services. For purposes of this Section, "customer" refers to the immediate purchaser of the telecommunications service, whether or not that customer is the ultimate end user of that service.~~

Section 5.9.2[95]

242. AT&T's comments in section 5.9.2 are intended to clarify and address certain matters that may occur in the process of handling an indemnified claim.

5.9.2 The indemnification provided herein shall be conditioned upon:

5.9.2.1 The indemnified Party shall promptly notify the indemnifying Party of any action taken against the indemnified Party relating to the indemnification. Failure to so notify the indemnifying Party shall not relieve the indemnifying Party of any liability that the indemnifying Party might have, except to the extent that such failure prejudices the indemnifying Party's ability to defend such claim.

5.9.2.2 If the indemnifying Party wishes to defend against such action, it shall give written notice to the indemnified party of acceptance of the defense of such action. In such event, ~~T~~the indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event that the indemnifying Party does not accept the defense of an action, the indemnified Party shall have the right to employ counsel for such defense at the expense of the indemnifying Party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such action and the relevant records of each Party shall be available to the other Party with respect to any such defense.

5.9.2.3 In no event shall the indemnifying Party settle or consent to

[95] AT&T Initial Comments pg 35

any judgment pertaining to any such action without the prior written consent of the indemnified Party. In the event the indemnified Party withholds such consent, the indemnified Party may, at its cost, take over such defense, provided that, in such event, the indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant indemnified party against, any cost or liability in excess of such refused compromise or settlement.

a) Qwest Position- Supplemental Affidavit

243. Qwest points out that the Arizona Commission has approved the language of Section 5.9 in interconnection agreements, and commissions in other states have approved it as well. Qwest provides a description of the general intent of the subsections with 5.9. These descriptions are not repeated in this report. This report section notes Qwest comments regarding the AT&T position.

Section 5.9.1.2

244. AT&T argues that Qwest should have an obligation to cover any claim from its end users that results from faulty Qwest service. This request goes far beyond standard indemnifications provided in the service industry. AT&T is responsible for its business relationships with its end users and should cover any concerns that it has over liability through the contracts that it has with its end users.

Section 5.9.1.4

245. Regarding 5.9.1.4, Qwest states that the language is not intended to modify substantively the rights and obligations set out in Sections 5.9.1.1 through 5.9.1.3.

246. Qwest does not propose alternative language in the May 11 supplemental affidavit.

a) Qwest Errata Rebuttal Position[96]

247. Qwest addresses AT&T's proposed revision of Section 5.9.1.1, the deletion of Sections 5.9.1.2, 5.9.1.3, and 5.9.1.4 and modification of Section 5.9.2.

248. Qwest states that the intent of AT&T's proposed changes to the indemnification section are to expose Qwest to more liability because otherwise "there will be little incentive left to insure Qwest's performance of interconnection agreements." Qwest argues this is not an appropriate standard for evaluating SGAT indemnification provisions. The indemnification provision of the SGAT should be aimed at reflecting standard practices within the telecommunications industry.

[96] Qwest Rebuttal pgs 49-55

249. Regarding the proposed striking of the first clause of 5.9.1.1 on the ground that "there is no basis to exclude CLEC customer claims for which Qwest is responsible", the language that AT&T has deleted does not exclude CLEC customer claims for which Qwest is responsible. Nevertheless, Qwest can agree to this SGAT modification; Section 5.9.1.2 specifically addresses end user claims. AT&T also adds language stating, "Except as otherwise provided in Section 5.10 . . .." This addition is unnecessary. SGAT Section 5.10 is the Intellectual Property section of the SGAT, and as is discussed below, indemnification is not appropriate in that context. Qwest also accepts proposed modification to the provision relating to attorneys' fees with the exception of the unexplained and unnecessary reference to "accounting fees."

250. Regarding the AT&T proposed inclusion of a phrase in Section 5.9.1.1, "or the environment", this could potentially vastly expand the parties' environmental liability. Environmental liability issues are addressed specifically in SGAT Section 5.20, and should not be addressed in Section 5.9. On the other hand, AT&T's addition of the words "for breach of" appears to clarify the SGAT and can be adopted.

251. Regarding the 5.9.1.1 unilateral provision indemnifying CLEC for infringement issues that arise out of the CLEC's or its customer's use of services provided under the agreement, this provision would dramatically alter, in a one-sided manner, the intellectual property rights and obligations of the parties and cannot be accepted.

252. To further clarify Section 5.9.1.1, Qwest proposes additional language, consistent with the limitations of liability contained in Section 5.8, regarding the limits of each Party's indemnification obligations under Section 5.9.1.1.

253. On the AT&T concern that 5.9.1.2 does not sufficiently hold Qwest "accountable", Qwest notes that it is inappropriate for AT&T to use general provisions (such as indemnification language), which should reflect commercial practices, simply as a means of exposing Qwest to greater potential liability. Qwest proposes a complete revision of Section 5.9.1.2 to clarify its intent.

254. AT&T also proposes the deletion of Section 5.9.1.3 (relating to claims based on the content of a transmission). Assuming that Section 5.9.2 as revised is adopted, Qwest can agree to the deletion of Section 5.9.1.3.

255. AT&T further proposes the deletion of Section 5.9.1.4. The language could be clarified, and Qwest proposes a complete revision of Section 5.9.1.4 for that purpose.

256. Finally, regarding AT&T suggested modifications of Section 5.9.2, the AT&T language spells out how the matter is to be addressed if the indemnifying party chooses not to defend the action. This additional language in Section 5.9.2.2 is acceptable to Qwest. AT&T also adds language regarding the circumstance in which the indemnified Party withholds consent from a settlement. This additional language also appears reasonable and may be accepted.

257. Qwest then responds to the WorldCom suggested changes. Regarding the WorldCom contention that Qwest's indemnification language is "too generous for Qwest. ...", Qwest states that this is incorrect and the indemnification language is reciprocal and benefits both Parties. Moreover, the general indemnification language (Section 5.9.1.1) provides indemnification where the cause of the claim is the indemnifying Party's failure to perform under the Agreement. Section 5.9.1.2 creates an exception to 5.9.1.1, specifically requiring the Parties to indemnify each other for claims made by their end users -- regardless of fault -- unless the indemnifying Party's willful misconduct is the cause. This is an exception to the general rule of 5.9.1.1.

258. WorldCom's suggested language regarding indemnification is generally consistent with Qwest's SGAT language and no additional modifications of Qwest's SGAT language regarding indemnification need be considered.

259. The following is the proposed language for Qwest's SGAT 5.9.1 and 5.9.2 noted above:

> 5.9.1 The Parties agree that the following constitute the sole indemnification obligations between and among the Parties:
>
> > 5.9.1.1 Each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an "Indemnitee") from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (including attorneys' fees), whether suffered, made, instituted, or asserted by any person or entity, for invasion of privacy, bodily injury or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, up to the total amount that is or would have been charged for services not performed or improperly performed, resulting from the Indemnifying Party's breach of or failure to perform under this Agreement, regardless of the form of action, whether in contract, warranty, strict liability, or tort including (without limitation) negligence of any kind.
> >
> > 5.9.1.2 In the case of a loss alleged or incurred by an end user of either Party, the Party whose end user alleged or incurred such loss (Indemnifying Party) shall defend and indemnify the other Party (Indemnified Party) against any and all such claims or loss by its end users regardless of whether the underlying service was provided or unbundled element was provisioned by the Indemnified

Party, unless the loss was caused by the willful misconduct of the (Indemnified) Party.

5.9.1.3 Delete

5.9.1.4 For purposes of Section 5.9.1.2, where the Parties have agreed to provision line sharing using a POTS splitter: "end user" means the DSL provider's end user for claims relating to DSL and the voice service provider's end user for claims relating to voice service.

5.9.2 The indemnification provided herein shall be conditioned upon:

5.9.2.1 The Indemnified Party shall promptly notify the Indemnifying Party of any action taken against the Indemnified Party relating to the indemnification. Failure to so notify the Indemnifying Party shall not relieve the Indemnifying Party of any liability that the Indemnifying Party might have, except to the extent that such failure prejudices the Indemnifying Party's ability to defend such claim.

5.9.2.2 If the Indemnifying Party wishes to defend against such action, it shall give written notice to the Indemnified Party of acceptance of the defense of such action. In such event, the Indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the Indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event that the Indemnifying Party does not accept the defense of the action, the Indemnified Party shall have the right to employ counsel for such defense at the expense of the Indemnifying Party. Each Party agrees to cooperate with the other Party in the defense of any such action and the relevant records of each Party shall be available to the other Party with respect to any such defense.

5.9.2.3 In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party. In the event the Indemnified Party withholds consent, the Indemnified Party

may, at its cost, take over such defense, provided that, in such event, the Indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant Indemnified Party against, any cost or liability in excess of such refused compromise or settlement.

b) WorldCom Position[97]

260. WorldCom suggest their indemnity language is standard indemnity language and should be used in place of the Qwest language. WorldCom states Qwest's language is not standard and is heavily weighted in Qwest's favor.

261. Section 5.9.1. excepts indemnity for claims made by end users of one Party against the other Party based on defective or faulty services provided by the other Party to the one Party. This exception only benefits Qwest as it provides essentially all the services under the Agreement. Further, it allows Qwest to absolve itself of indemnity responsibility resulting for claims that are the result of Qwest's negligent or grossly negligent conduct.

262. Section 5.9.1.2 reinstates the Qwest indemnity obligation but only for intentional and malicious conduct. The language continues to absolve Qwest for its responsibility for negligent conduct. WorldCom states their language has each Party indemnify the other for claims resulting from the other Party's acts or omissions or the failure to perform its obligations under the Agreement.

263. Section 5.9.1.3 is confusing and unnecessary and is already covered by the WorldCom language.

264. Section 5.9.1.4 is nonstandard, confusing and unnecessary language that is already covered by the WorldCom language. WorldCom's language that each Party indemnifies the other for claims resulting from the acts or omissions of the Indemnifying Party would cover this situation.

265. WorldCom states that their language regarding notice, authority to defend and settle is standard language, and more clearly written than that of the Qwest version in 5.9.2. WorldCom states "The Qwest language seems to contradict itself by first stating that indemnification IS conditioned on prompt notice of claim by the indemnified Party to the indemnifying Party, then stating that indemnification is NOT COMPLETELY conditioned on such notice, but then again it IS conditioned to the extent the failure to promptly notify prejudices the indemnifying Party's ability to defend the claim."

[97] WorldCom Supplemental pg 20

Resolution(Section 5.9.1 and all subsections)

266. None of the specific word changes suggested were incorporated. The SGAT remains unchanged. Qwest should make the proposed, and agreed upon, changes in order to be compliant with this SGAT section.

Resolution (Section 5.9.2)

267. Wording of subsections 5.2.2 and 5.2.3 differs from the Qwest proposed language above as shown below:

> 5.9.2 The indemnification provided herein shall be conditioned upon:
>
> 5.9.2.1 The indemnified Party shall promptly notify the indemnifying Party of any action taken against the indemnified Party relating to the indemnification. Failure to so notify the indemnifying Party shall not relieve the indemnifying Party of any liability that the indemnifying Party might have, except to the extent that such failure prejudices the indemnifying Party's ability to defend such claim.
>
> 5.9.2.2 The indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the indemnified Party may engage separate legal counsel only at its sole cost and expense.
>
> 5.9.2.3 In no event shall the indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the indemnified Party.

268. Qwest should make the changes to these two subsections in order to be compatible with SGAT Section 5.9.2

Section 5.10 – Intellectual Property

a) AT&T Position[98]

269. Qwest as the supplier of the technology should defend and indemnify the CLEC from lawsuits against a CLEC claiming that the technology the CLEC is using (and has been provided by Qwest) infringes on some third-party's intellectual property rights,

[98] AT&T Initial Comments pg 36

5.10.1 Each Party hereby grants to the other Party the limited, personal and nonexclusive right and license to use its patents, copyrights and trade secrets but only to the extent necessary to implement this Agreement or specifically required by the then-applicable federal and state rules and regulations relating to Interconnection and access to telecommunications facilities and services, and for no other purposes. Nothing in this Agreement shall be construed as the grant to the other Party of any rights or licenses to trademarks.

~~5.10.2 The rights and licenses above are granted "AS IS, WITH ALL FAULTS", and the other Party's exercise of any such right and license shall be at the sole and exclusive risk of the other Party. Neither Party shall have any obligation to defend, indemnify or hold harmless the other based on or arising from any claim, demand, or proceeding (hereinafter "claim") by any third party alleging or asserting that the use of any circuit, apparatus, or system, or the use of any software, or the performance of any service or method, or the provision of any facilities by either Party under this Agreement constitutes infringement, or misuse or misappropriation of any patent, copyright, trade secret, or any other proprietary or intellectual property right of any third party.~~

b) **Qwest Position**[99]

270. AT&T has suggested that Qwest should be required to indemnify CLECs for infringing upon third party intellectual property rights. In commercial agreements, indemnification clauses are typically a negotiated term and, contrary to the assertion of AT&T, there is no "customary" provision. Intellectual property issues are often totally out of the control of the supplying party. Thus, the supplying party would be insuring against an unknowable and uncontrollable risk if it offered indemnification for all intellectual property claims. Such insurance may be available from Lloyds of London at some (high) cost but should not be imposed on Qwest.

271. Regarding WorldCom's proposed Intellectual Property provision, the first sentence in Section 10.1 essentially states the common law and is unnecessary. The second sentence is substantially the same in scope as Paragraph 5.10.1 of the SGAT and WorldCom has not presented any argument as to why its proposal is better. The final portion of the paragraph is essentially dealing with the indemnification issue discussed above with respect to AT&T's proposal.[100]

272. The WorldCom issues in Section 10.1.2 were discussed in connection with AT&T's proposed changes to 5.10.7 above.

[99] Qwest Rebuttal pgs 55-56
[100]/ Page 60 - Larry Brotherson Errata Rebuttal Affidavit

273. Also, the WorldCom issues in Section 10.2 were discussed in connection with the indemnification issue discussed above with respect to AT&T's proposal.[101]

Resolution(Sections 5.10.1 and 5.10.2)

274. The WorldCom and AT&T suggested changes were not made to the SGAT.

Section 5.10.3

a) AT&T Position[102]

275. The proposed changes in section 5.10.3 proposed are intended to more fully capture the FCC's decision. This obligation is an ILEC obligation, not a CLEC obligation, therefore this provision should not be reciprocal. It should apply to Qwest only.

> To the extent required under applicable federal and state ~~rules~~ law, Qwest ~~the Party providing access~~ shall use its best efforts to provide all features and functionalities of the facilities, equipment and services it provides under this Agreement and to obtain, from its vendors who have licensed intellectual property rights to Qwest~~such Party~~ in connection with facilities and services provided hereunder, licenses under such intellectual property rights as necessary for CLEC~~the other Party~~ to use such facilities, equipment and services as contemplated hereunder and at least in the same manner as used by Qwest.

b) Qwest Position[103]

276. Regarding the AT&T assertion that changes to Section 5.10.3 more fully capture the FCC's decision on Intellectual Property rights, the FCC, in its order, made certain determinations about facilities, equipment and services that an ILEC provides to a CLEC.[104] The *Intellectual Property Order* specifically calls for the "best efforts" standard set forth in Section 5.10.3 of the SGAT and provides other guidance. It also states that this obligation is an ILEC obligation, not a CLEC obligation, and therefore this provision should not be reciprocal. It should apply to Qwest only. The FCC determined in its decision that the ILEC's obligation is directly related to the ILEC's duties under Section 251(c)(3) of the Telecommunications Act of 1996.[105] Qwest agrees with this latter point and will change the section accordingly.

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[101]/ Page 60 - Larry Brotherson Errata Rebuttal Affidavit
[102] AT&T Initial Comments pg 37
[103] Qwest rebuttal pg 56
[104] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Memorandum Opinion and Order, FCC 00-139 (rel. April 27, 2000) *("Intellectual Property Order").*
[105] *Intellectual Property Order,* ¶ 9.

277. Qwest does not agree that the *Intellectual Property Order* specifically requires Qwest to use best efforts to provide all features and functionalities. Qwest's position is that it provides that Qwest use best efforts to obtain Intellectual Property rights for CLECs where Qwest has obtained its own license. AT&T's change in the second line seems to go to Qwest's efforts in providing the services – not in obtaining Intellectual Property licenses. AT&T's insertion at the end of the paragraph seems unnecessary. Qwest is obligated to use best efforts to obtain licenses to the extent it has its own licenses and the licenses relate to the Agreement. There is no reason to extend the obligation to services outside the scope of the Agreement, as AT&T's addition appears to do.

Section 5.10.3.1

a) AT&T Position[106]

278. The covenants and warranties called for in section 5.10.3.1 proposed by AT&T are consistent with the FCC's decision on intellectual property and help to flesh out the "best efforts" standard called for by the FCC. This language calls for assurances from Qwest that it will not engage in behavior that interferes with the right of a CLEC to use the intellectual property contained in facilities, equipment or services provided by Qwest under this Agreement.

> 5.10.3.1. Qwest covenants that it will not enter into any licensing agreements with respect to any Qwest facilities, equipment or services, including software, that contain provisions that would disqualify CLEC from using or interconnecting with such facilities, equipment or services, including software, pursuant to the terms of this Agreement. Qwest warrants and further covenants that it has not and will not knowingly modify any existing license agreements for any network facilities, equipment or services, including software, in whole or in part for the purpose of disqualifying CLEC from using or interconnecting with such facilities, equipment or services, including software, pursuant to the terms of this Agreement. To the extent that providers of facilities, equipment, services or software in Qwest's network provide Qwest with indemnities covering intellectual property liabilities and those indemnities allow a flow-through of protection to third parties, Qwest shall flow those indemnity protections through to CLEC.

b) Qwest Position[107]

279. The proposed AT&T language calls for assurances from Qwest that it will not engage in behavior that interferes with the right of a CLEC to use the intellectual

[106] AT&T Initial Comments pg 37
[107] Qwest rebuttal pgs 57-58

property contained in facilities, equipment or services provided by Qwest under this Agreement.

280. This clause is wholly unnecessary. The first two sentences state that Qwest will not enter into an agreement that would, effectively, prevent it from performing under this Agreement. It is unnecessary to specifically state all of the various ways in which a party may breach an agreement and have that party specifically agree not to do those things. The third sentence concerns third party indemnities. While Qwest may choose to negotiate for whatever indemnities it deems necessary or desirable in negotiations with its vendors, there is no need to tie Qwest's hands in negotiations with its vendors by requiring Qwest to obtain these "flow through" indemnities.

Section 5.10.3.2

a) AT&T Position[108]

281. The indemnity proposed by AT&T in section 5.10.3.2 is important as a method to enforce Qwest's duty to obtain intellectual property rights to the facilities, equipment and services Qwest provides to CLEC under this Agreement. If Qwest is held accountable for failing to obtain all of the rights necessary, then Qwest will have a strong incentive to perform.

> 5.10.3.2 Qwest shall indemnify and hold CLEC harmless from and against any loss, cost, expense or liability arising out of a claim that CLEC's use, pursuant to the terms of this Agreement, of any facilities, equipment, services or equipment (including software) used by Qwest in the performance of this Agreement infringes, misappropriates or otherwise violates the intellectual property rights of any third party.

b) Qwest Position[109]

282. AT&T proposes an indemnity provision in its Section 5.10.3.2. Qwest's position on indemnification for intellectual property issues is covered above with respect to Paragraph 5.10.2.

Resolution

283. The November 30, 2001 SGAT contains no subsections to 5.10.3 since Qwest's position is that these matters are already covered and the proposed subsections are unnecessary. However, Section 10.3, as shown in the November 30, 2001 SGAT, is not the same as that to which Qwest agreed on May 15, 2001, and should be changed in order to comply with this SGAT section.

[108] AT&T Initial Comments pg 37-38
[109] Qwest Rebuttal pg 58

Section 5.10.7.

a) AT&T Position[110]

284. AT&T has stricken the first and last parts of section 5.10.7. Both provisions overreach on what they ask of the CLEC. Simply put, each party should simply adhere to applicable law and the ownership rights and infringement issues are covered.

> ~~5.10.7 CLEC acknowledges the value of the mark "Qwest" Qwest and the goodwill associated therewith and acknowledges that such goodwill is a property right belonging to Qwest Communications International Inc. Qwest (the "Owner"). Qwest and~~ CLEC each recognizes~~s~~ that nothing contained in this Agreement is intended as an assignment or grant to the other~~CLEC~~ of any right, title or interest in or to the ~~M~~trademarks or service marks of the other (the "Marks") and that this Agreement does not confer any right or license to grant sublicenses or permission to third parties to use the Marks of the other and is not assignable. Neither party ~~CLEC~~ will do ~~no~~anything inconsistent with the other's~~Owner's~~ ownership of their respective Marks, and all rights, if any, that may be acquired by use of the Marks shall inure to the benefit of the their respective ~~O~~owners. The Parties shall comply will all applicable law governing Marks worldwide and neither Party will infringe the Marks of the other. ~~CLEC will not adopt, use (other than as authorized herein), register or seek to register any mark anywhere in the world which is identical or confusingly similar to the Mark or which is so similar thereto as to constitute a deceptive colorable imitation thereof or to suggest or imply some association, sponsorship, or endorsement by the Owner. The Owner makes no warranties regarding ownership of any rights in or the validity of the Mark.~~

b) Qwest Position

285. AT&T has stricken the first and last parts of Section 5.10.7 and in the balance of the provision, AT&T makes the provision reciprocal.

286. The provisions objected to in this paragraph relate directly to rights granted by Qwest to CLECs to use the "Authorized Phrase" in paragraph 5.10.6. If AT&T were agreeable to removing the ability of the CLEC to use the Authorized Phrase, then its changes would be acceptable. Otherwise, the provisions of this paragraph are necessary and reasonable to protect Qwest's trademark rights especially in a situation, such as this, where it has granted a right to use its name. Because the CLEC has not

[110] AT&T Initial Comments pgs 38-39

granted reciprocal rights to use its trademarks, AT&T's proposal to make this language reciprocal is misguided.

Resolution

287. The text stricken by AT&T is still included in the SGAT. No changes were noted to the SGAT.

Section 5.10.8

a) AT&T Position[111]

288. AT&T has proposed a new section 5.10.8.. This section calls for the disclosure of certain information by Qwest to the ILEC regarding intellectual property.

> 5.10.8 For all intellectual property owned, controlled or licensed by third parties associated with the unbundled network elements provided by Qwest under this Agreement, either on the Effective Date or at any time during the term of the Agreement, Qwest shall promptly disclose to CLEC in writing (i) the name of the party owning, controlling or licensing such intellectual property, (ii) the facilities or equipment associated with such intellectual property, (iii) the nature of the intellectual property, and (iv) the relevant agreements or licenses governing Qwest's use of the intellectual property. Within five (5) business days of a request by CLEC, Qwest shall provide copies of any relevant agreements or licenses governing Qwest's use of the intellectual property to AT&T. To the extent Qwest is prohibited by confidentiality or other provisions of an agreement or license from disclosing to CLEC any relevant agreement or license, Qwest shall immediately (i) disclose so much of it as is not prohibited, and (ii) exercise best efforts to cause the vendor, licensor or other beneficiary of the confidentiality provisions to agree to disclosure of the remaining portions under terms and conditions equivalent to those governing access by and disclosure to Qwest.

b) Qwest Position

289. This proposed AT&T section calls for the disclosure of certain information by Qwest to the CLEC regarding intellectual property. The FCC calls for the disclosure of this information and states that failure by the ILEC to make this disclosure could constitute a violation of Sections 251(c)(1) and 251(c)(3).[112]

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[111] AT&T Initial Comments pg 40

[112] *Intellectual Property Order, ¶ 17.*

290. It is impossible for Qwest to know about all third party intellectual property associated with unbundled network elements. Thus, the first sentence of the proposed language is overreaching in reciting "all intellectual property owned, controlled or licensed by third parties," and should read "all intellectual property licensed by third parties to Qwest". Further, disclosure of all intellectual property license agreements related to an unbundled network element may be burdensome, and this burden should only be imposed on Qwest when and where there is a demonstrated need on the part of the CLEC to have access to the agreements. Further, the five business day limitation suggested by AT&T is arbitrary. Qwest suggests that a "reasonable period of time" standard be applied. Qwest is also adding language to clarify that Qwest is not obligated to disclose the existence of agreements where the terms of such agreements prohibit disclosure of their existence. This is consistent with language proposed by AT&T recognizing that certain agreements may be subject to such restrictions and requiring Qwest to use best efforts to negotiate with the other party to the agreement to allow disclosure.[113]

Resolution

291. The SGAT contains no Section 5.10.8. The suggested addition by AT&T was not accepted.

Section 5.11 – Warranties

a) AT&T Position[114]

292. AT&T has proposed certain warranties in section 5.11 of the SGAT. To be consistent with that proposed addition, AT&T has proposed the following change to section 5.11.1

> 5.11.1 Except as expressly set forth in ~~notwithstanding any other provision of~~ this agreement, the parties agree that neither party has made, and that there does not exist, any warranty, express or implied, including but not limited to warranties of merchantability and fitness for a particular purpose and that all products and services provided hereunder are provided "as is," with all faults.

b) WorldCom Position[115]

293. WorldCom proposes language for 5.11 "that is complete and appropriate". Under the nondiscrimination provisions of the Act, Qwest may not disclaim that the services that it provides under the Act are identical to the services that it provides to itself.

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[113]/ Pages 59 & 60 - Larry Brotherson Errata Rebuttal Affidavit
[114] AT&T Initial Comments pg 40
[115] WorldCom Supplemental pg 22

c) Qwest Position[116]

294. Qwest's SGAT Section 5.11 disclaims express or implied warranties, consistent with Article 2 of the Uniform Commercial Code. Qwest does not concur with AT&T's proposed language for 5.10.3.1. However, the change proposed by AT&T will ensure that, if the agreement contains -- or is later amended to contain -- any warranty provision whatsoever, Section 5.11.1 will be consistent with that warranty. Accordingly, Qwest accepts the change proposed by AT&T for Section 5.11.1.

295. WorldCom offers virtually no support for its proposal, other than to state that Section 5.11 is "inadequate" and to contend that Qwest may not "disclaim" performance standards. Of course, Section 5.11 is not intended to, and does not, disclaim any performance standards.

296. WorldCom's proposed "warranty" language cannot be accepted, for several reasons. First, each of the issues addressed by WorldCom -- the standards applicable to interconnection, to UNEs, to ancillary services, and so forth -- is addressed elsewhere in the SGAT. WorldCom should seek to address the applicable standards in the context of the relevant portions of the SGAT. Addressing the standards in the context of Section 5.11 of the SGAT is confusing.

297. To the extent that WorldCom seeks to do something other than describe the applicable standards for UNEs and interconnection, then it becomes unclear what WorldCom's intent actually is in their proposal.

298. As Qwest has discussed in the context of other provisions of the SGAT, there is no basis in law for the "warranty" provisions WorldCom proposes. WorldCom misconstrues the proper standards for UNEs, interconnection, and the other services provided. Qwest will not address these issues again in the present context. WorldCom's language should be rejected because it is at best superfluous, and at worst inconsistent with the other provisions of the SGAT.

Resolution

299. The November 30, 2001 SGAT does not reflect the change proposed by AT&T, although Qwest accepted it on May 15, 2001. Qwest should make this change in order to comply with this Section..

Section 5.12 – Assignment

a) AT&T Position[117]

300. If Qwest seeks to assign its obligations under this Agreement to an affiliate without CLEC's consent (AT&T added the consent language because AT&T believed that is what Qwest intended) then Qwest should remain responsible if that

[116] Qwest Rebuttal pgs 61-63
[117] AT&T Initial Comments pg 40

affiliate fails to perform. In addition, AT&T struck the language prohibiting assignment by CLEC to a CLEC affiliate.

301. All CLECs have the right to pick and choose some or all of the terms of existing interconnection agreements under section 252(i) of the Act and section 1.8 of this SGAT. The stricken language seems to infringe on that right.

> 5.12.1 Neither Party may assign or transfer (whether by operation of law or otherwise) this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party. Notwithstanding the foregoing, either Party may assign or transfer this Agreement to a corporate affiliate or an entity under its common control without the consent of the other Party; provided that the performance of this Agreement by any such assignee is guaranteed by the assignor. ~~however, if CLEC's assignee or transferee has an Interconnection agreement with Qwest, no assignment or transfer of this Agreement shall be effective without the prior written consent of Qwest. Such consent shall include appropriate resolutions of conflicts and discrepancies between the assignee's or transferee's Interconnection agreement and this Agreement.~~ Any attempted assignment or transfer that is not permitted is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns.

b) Qwest Position

302. See discussion of Qwest position following 5.12.2

Resolution

303. No changes were made to the November 30, 2001 SGAT.

Section 5.12.2.

a) AT&T Position[118]

304. AT&T has totally stricken section 5.12.2 for two reasons. First, this provision negatively impacts a CLEC's right to pick and choose under section 252(i) of the Act. Second, even if one or more legal entities merge, if they remain separate legal entities with their own certificates, there is nothing under the law that would prevent each from having its own interconnection agreement with different terms if that is what those entities choose.

[118] AT&T Initial Comments pgs 41-42

305. AT&T proposes the addition of a new section 5.12.2 dealing with the sale of Qwest exchanges. This addition is warranted, as AT&T has seen Qwest sell many of its exchanges during the term of its current interconnection agreements. The current interconnection agreements with Qwest do not have sale of exchange provisions, and the process occurred in a contentious and inefficient manner.

> 5.12.2 Transfer of all or Part of Qwest Telephone Operations. If Qwest directly or indirectly (including without limitation through a transfer of control or by operation of law) sells, exchanges, swaps, assigns, or transfers ownership or control of all or any portion of Qwest's telephone operations (any such transaction, a "Transfer") to any purchaser, operator or other transferee (a "Transferee"), Qwest must:
>
> a) obtain a written agreement from the Transferee, prior to the Transfer (in form and substance reasonably satisfactory to AT&T), that Transferee agrees to be bound by the interconnection and intercarrier compensation obligations set forth in this Agreement with respect to the portion of Qwest's telephone operations so transferred, until an interconnection agreement between CLEC and the Transferee becomes effective.
>
> b) provide CLEC with prompt written notice of any agreement or understanding relating to any proposed Transfer, and in any event at least one hundred eighty (180) days prior written notice of the completion of such Transfer;
>
> c) use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement;
>
> d) serve CLEC with a copy of any Transfer application or other related regulatory documents associated with the Transfer when filed with the Commission or the FCC;
>
> e) not oppose CLEC's intervention in any proceeding relating to the Transfer; and not challenge the Commission's authority in any proceeding relating to the Transfer to hear the issue of whether the Transferee should be required to adopt any or all of the terms of this Agreement.

b) Qwest Position[119]

306. All Qwest comments regarding section 5.12 are shown here. Both WorldCom and AT&T have addressed the Assignment provision. WorldCom in their proposed Section 5.2 would impose a prohibition upon Qwest's subcontracting the

[119] Qwest Rebuttal Pgs 63-66

performance of any obligation without WorldCom's consent. This is a completely unreasonable restriction that would severely hamper Qwest's ability to perform under the Agreement. Rather, as stated in the second sentence in that paragraph, when Qwest subcontracts work it remains fully responsible under the Agreement, and that is the point.

307. If Qwest were to assign the Agreement to an affiliate, AT&T seeks to have Qwest be the guarantor of the performance of the agreement by that affiliate. There are no grounds for the blanket imposition of a guarantor role absent any indication that a Qwest affiliate would be unable to perform. Given the magnitude of the obligations under the Agreement, it is highly unlikely that an affiliate would agree to the assignment if there were any significant risk that it could not perform.

308. AT&T protests Qwest's desire to have CLECs that are merged or otherwise consolidated come under the terms of one Interconnection Agreement on two bases: (1) AT&T believes it would abrogate the CLECs' Pick and Choose rights, and (2) AT&T contends that the decision as to what kind of Interconnection Agreements the consolidated companies have should be their decision. As to the first concern, Qwest would agree to add a provision that nothing in this section is intended to restrict the CLEC's rights to opt into Interconnection Agreements under § 252(i) of the Act. As to the second concern, it is somewhat surprising given Qwest's and AT&T's experience with AT&T's acquisition of TCG, TCI and Media One.

309. AT&T proposes an additional section aimed at the sale of Qwest's exchanges. Far from the contentious, inefficient process that AT&T alleges occurred, things went so smoothly that AT&T intervened in very few of the state commission approval proceedings and withdrew from those in which it did intervene.

310. This limited AT&T role in the proceedings most likely occurred because Qwest is aware of the CLECs' need for stability in their interconnection arrangements and took this need into account in its sale of exchanges to Citizens. AT&T's Exhibit E was U S WEST's (now Qwest's) notice to the CLECs of the sale of exchanges. As stated in that notice, Citizens agreed to initiate negotiations for a new Interconnection Agreement prior to close of the sale. If Citizens was unable to reach a successful agreement with the CLEC, it agreed to be bound by Qwest's Interconnection Agreement for the term of that Agreement. Indeed, Citizens and AT&T were able to successfully negotiate a new Agreement long before the close of the sales.

311. The Qwest revised Section 12 would read as follows:

> 5.12.1 Neither Party may assign or transfer (whether by operation of law or otherwise) this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party. Notwithstanding the foregoing, either Party may assign or transfer this Agreement to a corporate affiliate or an entity under its common control; however, if CLEC's assignee or transferee has an Interconnection agreement with Qwest, no assignment or transfer of this Agreement shall be

effective without the prior written consent of Qwest. Such consent shall include appropriate resolutions of conflicts and discrepancies between the assignee's or transferee's Interconnection agreement and this Agreement. Any attempted assignment or transfer that is not permitted is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns.

5.12.2 Without limiting the generality of the foregoing subsection, any merger, dissolution, consolidation or other reorganization of CLEC, or any sale, transfer, pledge or other disposition by CLEC of securities representing more than fifty percent (50%) of the securities entitled to vote in an election of CLEC's board of directors or other similar governing body, or any sale, transfer, pledge or other disposition by CLEC of substantially all of its assets, shall be deemed a transfer of control. If any entity, other than CLEC, involved in such merger, dissolution, consolidation, reorganization, sale, transfer, pledge or other disposition of CLEC has an Interconnection agreement with Qwest, the Parties agree that only one agreement, either this Agreement or the Interconnection agreement of the other entity, will remain valid. All other Interconnection agreements will be terminated. The Parties agree to work together to determine which Interconnection agreement should remain valid and which should terminate. In the event the Parties cannot reach agreement on this issue, the issue shall be resolved through the Dispute Resolution process contained in this Agreement.

5.12.3 Nothing in this section is intended to restrict the CLEC's rights to opt into Interconnection Agreements under § 252(i) of the Act.

Resolution

312. No changes were made to SGAT sections 5.12.1. and 5.12.2. Section 5.12.3 was not included in the November 30,2001 SGAT. It should be added, in order for Qwest to comply with this section..

Section 5.13 – Default

313. No CLECs filed testimony regarding this issue. Qwest states that the section should be retained.

Section 5.14 – Disclaimer of Agency

314. No CLECs filed testimony regarding this issue. Qwest states that the section should be retained.

Section 5.15 – Severability

a) Qwest Position[120]

315. Qwest starts by noting that WorldCom proposes language to replace Section 5.15 of the SGAT, without explaining why the SGAT language should be replaced or even explaining how its proposal differs from the SGAT language. Qwest identifies WorldCom's proposed language as follows:

> Section 29. Severability
>
> 29.1 Subject to Section [2] of this Part A, if any part of this Agreement is held to be invalid for any reason, such invalidity will affect only the portion of this Agreement which is invalid. In all other respects this Agreement will stand as if the invalid provision had not been a part of it, and the remainder of this Agreement will remain in full force and effect.

Qwest's SGAT language regarding severability states:

> 5.15.1 In the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable or invalid in any respect under law or regulation, the Parties will negotiate in good faith for replacement language as set forth herein. If any part of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability will affect only the portion of this Agreement which is invalid or unenforceable. In all other respects, this Agreement will stand as if such invalid or unenforceable provision had not been a part hereof, and the remainder of this Agreement shall remain in full force and effect.

316. Qwest sees the material difference as being WorldCom's omission of the requirement that the parties negotiate a replacement provision for a provision that has been declared invalid or unenforceable. Qwest agrees that it makes sense to include such a provision. If a significant portion of the SGAT is declared invalid, it is in the parties' mutual interest to negotiate a replacement provision. Qwest states that WorldCom includes a renegotiation provision in its Section 2.2 titled "Regulatory Approvals," but that provision relates only to portions of the SGAT that are made unlawful because of a change in the governing law. Qwest believes their SGAT language in Section 5.15.1 is

[120] Qwest Rebuttal pg 66

broader and includes invalidation of a provision for any reason. WorldCom's proposed language is unnecessarily narrow and it should be rejected.

Resolution

317. No changes were made to this section.

Section 5.16 – Nondisclosure

a) AT&T Position[121]

318. AT&T proposes additions to the language in section 5.16.1 to (1) specifically identify a category of information that is very sensitive and requires protection even if not marked and (2) to address the potential situation where one Party fails to identify information as Proprietary at the time of disclosure or within 10 days after an oral disclosure.

> 5.16.1 All information, including but not limited to specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data, (i) furnished by one Party to the other Party dealing with business or marketing plans, end user specific, facility specific, or usage specific information, other than end user information communicated for the purpose of providing directory assistance or publication of directory database, or (ii) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary", or (iii) communicated and declared to the receiving Party at the time of delivery, or by written notice given to the receiving Party within ten (10) calendar days after delivery, to be "Confidential" or "Proprietary" (collectively referred to as "Proprietary Information"), shall remain the property of the disclosing Party. A Party who receives Proprietary Information via an oral communication may request written confirmation that the material is Proprietary Information. A Party who delivers Proprietary Information via an oral communication may request written confirmation that the Party receiving the information understands that the material is Proprietary Information. Each Party shall have the right to correct an inadvertent failure to identify information as Proprietary Information by giving written notification within thirty (30) days after the information is disclosed. The receiving Party shall, from that time forward, treat such information as Proprietary Information.

[121] AT&T Initial Comments pg 43

b) WorldCom Position[122]

319. Section 5.16 is inadequate and incomplete by not identifying who can see confidential or proprietary material as is discussed in WorldCom's proposed language addressing this matter.

c) Qwest Position[123]

320. The "business or marketing plan" wording is troublesome to Qwest for several reasons. First, AT&T does not provide a definition of "business or marketing plan." Second, Qwest wants to leave it up to the supplying party to mark such plans as "confidential" or "proprietary". If the supplying party inadvertently fails to mark the plan "confidential" or "proprietary," Section 5.16.1 states that a supplying party may designate information as "confidential" or "proprietary" within ten days after disclosure of that information.

321. Regarding AT&T's second proposed change to Section 5.16.1 which would add a provision allowing a party that inadvertently discloses proprietary information to correct that unintentional disclosure within thirty days, AT&T proposes the language "to address the potential situation where one Party fails to identify information as Proprietary at the time of disclosure or within 10 days after an *oral* disclosure." AT&T Comments at 43-44 (emphasis added). Qwest believes the AT&T's proposal is based on a misreading of Section 5.16.1. The ten-day grace period does not apply only to oral disclosures. It applies to "[a]ll information . . . (iii) communicated and declared to the receiving Party at the time of delivery, or by written notice given to the receiving Party within ten (10) calendar days after delivery, to be "Confidential" or "Proprietary" . . .." The ten-day period is a reasonable amount of time to allow for designation of information as "confidential" or "proprietary." Qwest states that AT&T's concerns are already adequately addressed by the SGAT.

Resolution

322. No changes made to Section 5.16.1

Section 5.16.3

a) AT&T Position[124]

323. AT&T has proposed changes to section 5.16.3 to outline in greater detail the protections that confidential information requires and certain circumstances where confidential information may be disclosed.

> 5.16.3 In addition to any requirements imposed by Applicable Law, including, but not limited to, 47 U.S.C. § 222, ~~E~~each Party

[122] WorldCom Supplemental pg 22
[123] Qwest Rebuttal pgs 68-69
[124] AT&T Initial Comments pgs 44-45

> shall keep all of the other Party's Proprietary Information confidential, ~~and~~ shall use the other Party's Proprietary Information only for the purpose of performing under ~~in connection with~~ this Agreement, shall disclose it to no one other than its employees having a need to know for the purpose of performing under this Agreement, and shall safeguard it from unauthorized use or disclosure with at least the same degree of care with which the receiving Party safeguards its own Proprietary Information. If the receiving Party wishes to disclose the disclosing Party's Proprietary Information to a third party agent or consultant, such disclosure must be mutually agreed to in writing by the Parties to this Agreement, and the agent or consultant must have executed a written agreement of non-disclosure and non-use comparable in scope to the terms of this Section. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing.

b) Qwest Position[125]

324. AT&T does not explain why it believes the changes are necessary. There is no reason to adopt AT&T's proposed language as the SGAT already limits the use and dissemination of proprietary information. The SGAT language is modeled upon Section 222 of the Act, 47 U.S.C. § 222, which contains Congress' express direction regarding protection of customer and carrier information. AT&T provides no compelling reason to modify SGAT 5.16.3.

Resolution

325. The AT&T suggestions were not accepted. No changes were made to this SGAT section.

Section 5.16.5

a) AT&T Position[126]

326. AT&T has proposed an addition to section 5.16.5 that further explains that confidential information may be disclosed for certain regulatory or enforcement purposes, as long as the confidential information is protected.

> 5.16.5 Nothing herein is intended to prohibit a Party from supplying factual information about its network and Telecommunications Services on or connected to its network to regulatory agencies including the Federal Communications

[125] Qwest Rebuttal pg 70
[126] AT&T Initial Comments pg 45

Commission and the Commission so long as any confidential obligation is protected. In addition, either Party shall have the right to disclose Proprietary Information to any mediator, arbitrator, state or federal regulatory body, the Department of Justice or any court in the conduct of any proceeding arising under or relating in any way to this Agreement or the conduct of either Party in connection with this Agreement, including without limitation the approval of this Agreement, or in any proceedings concerning the provision of interLATA services by Qwest that are or may be required by the Act. The Parties agree to cooperate with each other in order to seek appropriate protection or treatment of such Proprietary Information pursuant to an appropriate protective order in any such proceeding.

b) Qwest Position[127]

327. AT&T's suggested change would broaden the SGAT provision that allows a party to disclose factual information about its network and telecommunications services on or connected to its network to regulatory agencies, as long as "any confidential obligation is protected." Qwest is willing to adopt AT&T's proposed changes and revise Section 5.16.5 of the SGAT as follows:

5.16.5 Nothing herein is intended to prohibit a Party from supplying factual information about its network and Telecommunications Services on or connected to its network to regulatory agencies including the Federal Communications Commission and the Commission so long as any confidential obligation is protected. In addition, either Party shall have the right to disclose Proprietary Information to any mediator, arbitrator, state or federal regulatory body, the Department of Justice or any court in the conduct of any proceeding arising under or relating in any way to this Agreement or the conduct of either Party in connection with this Agreement, including without limitation the approval of this Agreement, or in any proceedings concerning the provision of interLATA services by Qwest that are or may be required by the Act. The Parties agree to cooperate with each other in order to seek appropriate protection or treatment of such Proprietary Information pursuant to an appropriate protective order in any such proceeding.

Resolution

328. The AT&T suggested changes were not adopted. No changes were made to this SGAT section.

[127] Qwest Rebuttal pgs. 70-71

Section 5.16.7 (New Section proposed by AT&T)

a) AT&T Position[128]

329. AT&T proposes additional language dealing with forecasts in a new section 5.16.7 of the SGAT to address certain concerns previously raised.

5.16.7 CLEC Forecasts

a) CLEC forecasts shall be Proprietary Information and Qwest may not distribute, disclose or reveal, in any form, whether in aggregated, disaggregated, unattributed or otherwise, CLEC forecasts other than as allowed and described in subsections "b)" and "c)" below.

b) Qwest may disclose, on a need to know basis only, CLEC forecasts, to Qwest network and growth planning personnel responsible for ensuring that Qwest's local network can meet wholesale customer demand. In no case shall the Qwest network and growth planning personnel that have access to CLEC forecasts be involved in or responsible for Qwest's retail marketing, sales or strategic planning. Qwest will inform all network and planning personnel with access to CLEC forecasts of the confidential nature of such forecasts, and Qwest will have such personnel sign non-disclosure agreements related thereto. The non-disclosure agreements shall inform such personnel that, upon threat of termination, they may not reveal or discuss CLEC forecasts with those not authorized to receive such information.

c) Qwest shall maintain CLEC forecasts in secure files and locations such that access to the forecasts is limited to the personnel designated in subsection "b)" above and such that no other personnel have computer access to such information.

b) Qwest Position[129]

330. The only rationale offered by AT&T for this new section is that forecasts are "particularly sensitive" and that AT&T's proposed language addresses "certain concerns" that CLECs have previously raised regarding forecasts. Those concerns have been addressed. Section 7.2.2.8.12 of the SGAT addresses confidentiality of forecasts in the interconnection context. Similarly, Section 8.4.1.4, Collocation, also addresses

[128] AT&T Initial Comments pgs 45-46
[129] Qwest Rebuttal pgs 71-72

forecasting and has been thoroughly discussed. AT&T's concerns are also addressed by § 222 of the Act. It is inappropriate to consider this issue in this part of the SGAT.

Resolution

331. The new Section 5.16.7 as suggested by AT&T was not added. There is no Section 5.16.7 in the November 30, 2001 SGAT, although Qwest proposed one, different from AT&T's proposal, on May 15,2001. Qwest should add its proposed section 5.16.7 in order to comply with this SGAT section.

Section 5.16.8

a) AT&T Position[130]

332. AT&T proposes new wording in 5.16.8 to address "the importance and sensitive nature of confidential information". AT&T wording address remedies, including injunctive relief and specific performance to give the disclosing party a fairly prompt method of enforcing the confidentiality obligations.

> 5.16.8 Each Party agrees that the disclosing Party would be irreparably injured by a breach of this Agreement by the receiving Party or its representatives and that the disclosing Party shall be entitled to seek equitable relief, including injunctive relief and specific performance, in the event of any breach of the provisions of this Agreement. Such remedies shall not be deemed to be the exclusive remedies for a breach of this Agreement, but shall be in addition to all other remedies available at law or in equity.

b) Qwest Position[131]

333. Qwest recognizes that the clauses suggested by AT&T for 5.16.8 are typical in commercial contracts. Qwest is willing to adopt AT&T's suggested language with two exceptions. First, it is inappropriate to agree prospectively that a party "*would* be irreparably injured by a breach of this Agreement." Qwest would agree that a party "*could* be irreparably injured by a breach of this Agreement." Second, AT&T intended this clause to protect the confidentiality obligations. The clause should be expressly limited to equitable relief for breach of the confidentiality obligations of the SGAT. Qwest agrees to revise the SGAT to include the following new provision:

> 5.16.7 Each Party agrees that the disclosing Party could be irreparably injured by a breach of the confidentiality obligations of this Agreement by the receiving Party or its representatives and that the disclosing Party shall be entitled to seek equitable relief, including injunctive relief and specific performance, in the event of any breach of the confidentiality provisions of this Agreement.

[130] AT&T Initial Comments pgs 46-47
[131] Qwest Rebuttal pg 72

Such remedies shall not be deemed to be the exclusive remedies for a breach of the confidentiality provisions of this Agreement, but shall be in addition to all other remedies available at law or in equity.

c) Qwest's Response to WorldCom Proposed Language for Section 5.16[132]

334. WorldCom does not address specific 5.16 SGAT sub sections in their testimony. Therefore, Qwest lumps all 5.16 responses to the WorldCom suggested document into one section summarized as follows.

335. Qwest notes that WorldCom seems to raise only a single issue with Section 5.16 of the SGAT. This issue is that the SGAT does not specifically identify who may access confidential information. WorldCom does not limit its proposed language to that issue. Rather, WorldCom offers a *complete* replacement of Section 5.16 of the SGAT. WorldCom's "solution" of a discrete alleged problem by throwing out the entire section that contains that purported problem is no solution at all. WorldCom's tactic of wholesale replacement of SGAT provisions without any support or apparent rationale other than the mere fact that such provisions are contained in WorldCom's "model interconnection agreement" is contrary to the purpose and spirit of these proceedings.[133]

336. Qwest notes that they did review WorldCom's proposed section and did determine that one section (21.3) should be adopted. Other than the one section, Qwest asserts that there is no reason to replace any SGAT language based on WorldCom submittals. Qwest states that it believes it is incumbent upon WorldCom to provide compelling reasons to replace SGAT language, which WorldCom has not done.[134] Qwest does review certain aspects of the WorldCom proposed sections 21.1-21.5 on pages 73-78 of the Rebuttal Testimony of Larry Brotherson. Qwest notes that even in this five-page review, they do not address every issue they have with WorldCom's proposed language.

337. The one Section that Qwest will adopt is as follows:

> 5.16.8. Nothing herein should be construed as limiting either Party's rights with respect to its own Proprietary Information or its obligations with respect to the other Party's Proprietary Information under Section 222 of the Act.

Resolution

338. No section 5.16.8 exists in the November 30, 2001 SGAT; although Qwest agreed to the above language. Qwest should add the agreed upon language in order to comply with this SGAT section.

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[132] Qwest rebuttal pgs 73-78
[133] Qwest Rebuttal pg 73
[134] Qwest Rebuttal pg 73

Section 5.17 – Survival

a) AT&T Position[135]

339. AT&T proposes a change to section 5.17.1 intended to make it clear that the SGAT may expire or terminate prior to the end of the two year term or after the end of the initial two year term if the parties agree to an extension.

> 5.17.1 Any liabilities or obligations of a Party for acts or omissions prior to the termination or expiration of this Agreement ~~completion of the two-year term~~, and any obligation of a Party under the provisions regarding indemnification, Confidential or Proprietary Information, limitations of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination hereof.

b) Qwest Position[136]

340. Qwest concurs with this proposal. Accordingly, the current SGAT may be revised as follows:

> 5.17.1 Any liabilities or obligations of a Party for acts or omissions prior to the termination or expiration of this Agreement, and any obligation of a Party under the provisions regarding indemnification, Confidential or Proprietary Information, limitations of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination hereof.

Resolution

341. No changes were made to the November 30, 2001 SGAT. Qwest should make this wording change, to which it agreed on May 15, 2001 in order to comply with this section of the SGAT.

Section 5.18 – Dispute Resolution

a) AT&T Position[137]

342. AT&T is concerned about the potential time required for the BFR, SRP and pick and choose processes. AT&T wants a detailed process they can follow and the

[135] AT&T Initial Comments pg 47
[136] Qwest pg 78
[137] AT&T Initial Comments pgs 47-48

ability to have that process move quickly. AT&T proposes its own language to replace section 5.18.

343. AT&T proposes that sections 5.18.1 through 5.18.4 of the SGAT be replaced with the language set forth in Exhibit F of the initial testimony. [138]

344. AT&T also objects to the requirement in section 5.18.2 that any discussions between the parties be deemed confidential and not subject to the discovery, production or otherwise admissible in any proceeding, including arbitration of the dispute.[139]

b) WorldCom Position[140]

345. WorldCom argues that Qwest's language is inadequate and incomplete and that their language should be adopted.

c) Qwest Position[141]

346. Qwest notes that in order to "expedite" the dispute resolution process, AT&T proposes a 12-page, single space replacement for Section 5.18 of the SGAT. Qwest argues that AT&T does not specifically identify the differences in its proposal from the SGAT. Also the proposed process is more not less cumbersome. Key points of the Qwest arguments are as follows. Both processes have a dispute resolution mechanism but the AT&T proposal would likely lengthen the time required not shorten it. Both proposals have a formal arbitration process and the detailed process outlined by AT&T would be time consuming and is unnecessary. AT&T wants the arbitrators decision to be non-binding and submitted to the commission for review. This is too detailed and dictates the Commission process. "Service affecting" disputes have a separate process made necessary only by the cumbersome nature of the AT&T process. Qwest summarizes that the AT&T proposal provides no advantages and is cumbersome and time consuming.

347. Qwest notes that both WorldCom and AT&T suggest the use of Judicial Arbitration Mediation Service "J.A.M.S."/Endispute rather than American Arbitration Association ("AAA") as in 5.18. Qwest proposes additional language that would make this option available by mutual consent of the parties.

348. Qwest rejects the AT&T objection to the treatment of discussions and correspondence for subsequent proceedings. Qwest claims there is no basis for the assertion of a violation of CLEC rights or that it makes the process more cumbersome.

349. Regarding WorldCom's offered changes, Qwest notes that WorldCom offers replacement language but does not provide any explanation as to why their

[138] Exhibit F is not included as part of this report.
[139] AT&T Initial Comments- Exhibit F
[140] WorldCom Supplemental pg 22
[141] Qwest Rebuttal pgs 79-83

language is more complete. One particular change noted is that WorldCom would seek resolution of disputes at the Commission level before recourse to arbitration. Qwest states that the WorldCom language should not be adopted because it does not provide the proper incentives for dispute resolution.

350. Qwest proposes the following modification:

> If the vice-presidential level representatives have not reached a resolution of the Dispute within thirty (30) calendar days after the matter is referred to them, then either Party may demand that the Dispute be settled by arbitration. Such an arbitration proceeding shall be conducted by a panel of three arbitrators, knowledgeable about the telecommunications industry. The arbitration proceedings shall be conducted under the then-current rules of the American Arbitration Association ("AAA"). Alternatively, by agreement of the Parties the arbitration may be conducted pursuant to J.A.M.S./Endispute procedural rules. The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not state law, shall govern the arbitrability of the Dispute. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration proceedings shall occur in the Denver, Colorado metropolitan area or in another mutually agreeable location. It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular, some, or all Dispute(s).

Resolution

351. The modification proposed above by Qwest is for Section 5.18.3. The proposed wording of "("AAA"). Alternatively, by agreement of the Parties the arbitration may be conducted pursuant to J.A.M.S./Endispute procedural rules." from above is not in the November 30, 2001 SGAT nor is the addition of "Denver, Colorado" as proposed. These additions should be made in order for Qwest to comply with this SGAT section.

Section 5.19 – Controlling Law

a) AT&T Position[142]

352. In section 5.19, AT&T has replaced the reference to "the terms of the Act" with "applicable federal law."

[142] AT&T Initial Comments pg 48

> 5.19.1 This Agreement is offered by Qwest and accepted by CLEC in accordance with applicable federal law~~the terms of the Act~~ and the State law of Arizona. It shall be interpreted solely in accordance with applicable federal law~~the terms of the Act~~ and the State law of Arizona.

b) Qwest Comments[143]

353. Regarding the AT&T suggestion that Section 5.19 of the SGAT, "Controlling Law," be revised, Qwest agrees that this replacement, which would apply to the entire body of federal law, including the Act as well as FCC rules and decisions, is reasonable. Qwest agrees to revise Section 5.19 as follows:

> 5.19.1 This Agreement is offered by Qwest and accepted by CLEC in accordance with applicable federal law and the State law of Arizona. It shall be interpreted solely in accordance with applicable federal law ~~the terms of the act~~ and the State law of Arizona.

354. WorldCom offers, without explanation or reason, the "governing law" provision of its "model interconnection agreement" containing the following provision:

> 7.1 This Agreement will be governed by and construed in accordance with the Act and the FCC's Rules and Regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the {State of _____}, without regard to its conflicts of laws principles, will govern.

355. Qwest accepts AT&T's wording but rejects WorldCom's because the proposed language could introduce unnecessary ambiguity and conflict in determining when state law controls an aspect of the Agreement. The WorldCom's changes are unnecessary in light of the explicit reference to both federal and state law in Section 5.19 as revised.

Resolution

356. Actual wording of the November 30, 2001 SGAT does not contain the changes agreed to by Qwest and reads as follows:

> 5.19.1 This Agreement is offered by Qwest and accepted by CLEC in accordance with the terms of the Act and the state law of Arizona. It shall be interpreted solely in accordance with the terms of the Act and the state law of Arizona.

[143] Qwest Rebuttal pg 83

357. Qwest should replace the existing wording in the November 30, 2001 SGAT Section 5.19.1 with the revised wording which it accepted on May 15, 2001.

Section 5.20 – Responsibility for Environmental Contamination

a) Qwest Position

358. WorldCom's Sections 27.1 and 27.2 are substantively identical to SGAT 5.20. The only substantive difference between the language proposed by WorldCom and the language of SGAT 5.20 is WorldCom's Section 27.3. WorldCom proposes additional language requiring CLECs to comply with applicable law in the presence of suspected asbestos, disclaiming CLEC liability in connection with such asbestos, and requiring Qwest to advise CLECs of potential issues relating to asbestos. WorldCom's proposed additional language regarding asbestos is acceptable to Qwest. Accordingly, the following SGAT provision may be added:

> 5.20.2 In the event any suspect materials within Qwest-owned, operated or leased facilities are identified to be asbestos containing, CLEC will ensure that to the extent any activities which it undertakes in the facility disturb such suspect materials, such CLEC activities will be in accordance with applicable local, state and federal environmental and health and safety statutes and regulations. Except for abatement activities undertaken by CLEC or equipment placement activities that result in the generation of asbestos-containing material, CLEC does not have any responsibility for managing, nor is it the owner of, nor does it have any liability for, or in connection with, any asbestos-containing material. Qwest agrees to immediately notify CLEC if Qwest undertakes any asbestos control or asbestos abatement activities that potentially could affect CLEC personnel, equipment or operations, including, but not limited to, contamination of equipment.

Resolution

359. Section 5.20.2 as discussed above is not included in the November 30, 2001 SGAT. Since Qwest agreed to add the above Section 5.20.2 on May 15, 2001, it should add it in order to comply with this SGAT section.

Section 5.21 – Notices

a) AT&T Position[144]

360. The changes AT&T has proposed in section 5.21 allow for two additional methods of delivery of notices called for under this Agreement. These methods (personal

[144] AT&T

delivery and overnight courier) can be very important when time is of the essence. Waiting for delivery by the U.S. Postal Service may not address the urgency of certain situations. The change is to make sure that each party is properly notified of changes and that delivery confirmation is properly documented.

> 5.21.1 Any notices required by or concerning this Agreement shall be in writing and shall be sufficiently given if delivered personally, delivered by prepaid overnight express service, or sent by certified mail, return receipt requested, to Qwest and CLEC at the addresses shown below:
>
> Qwest Corporation
> Director Interconnection Compliance
> 1801 California, Room 2410
> Denver, CO 80202
>
> With copy to:
> Qwest Attention:
> Corporate Counsel, Interconnection
> 1801 California Street, 49th Floor
> Denver, CO 80202
>
> and to CLEC at the address shown below:
> Name:
>
> _____
>
> _____
>
> _____
>
> Each Party shall inform the other of any change in the above contact person and/or address using the method of notice called for in this Section 5.22.

b) Qwest Position[145]

361. Qwest addresses both WorldCom and AT&T suggested changes to Section 5.21. AT&T's suggested changes simply add two optional methods of service of notices and require a change of address or contact information to be given in accordance with Section 5.21. Qwest believes that AT&T's changes are reasonable and is willing to revise the SGAT as suggested by AT&T. WorldCom also suggests adding personal service as a valid method of giving notice under the SGAT as long as the party giving notice by personal service obtains a receipt that such service was made. WorldCom's suggested change also makes sense. Therefore, Qwest is willing to revise the SGAT in accordance with the changes suggested by AT&T and WorldCom as follows:

[145] Qwest Rebuttal pg 85

5.21.1 Any notices required by or concerning this Agreement shall be in writing and shall be sufficiently given if delivered personally, delivered by prepaid overnight express service, or sent by certified mail, return receipt requested, to Qwest and CLEC at the addresses shown below:

Qwest Corporation
Director Interconnection Compliance
1801 California, Room 2410
Denver, CO 80202

With copy to:
Qwest
Attention:
Corporate Counsel, Interconnection
1801 California Street, 49th Floor
Denver, CO 80202

and to CLEC at the address shown below:

Name:

_____
_____
_____

If personal delivery is selected to give notice, a receipt acknowledging such delivery must be obtained. Each Party shall inform the other of any change in the above contact person and/or address using the method of notice called for in this Section 5.21.

362. The WorldCom's proposal would require *any* communication made "under" the SGAT, in addition to "notices," to be made in writing pursuant to Section 5.21. Qwest is not willing to accept WorldCom's proposed language as it is too broad and would be unnecessarily burdensome.

Resolution

363. Changes proposed by Qwest above are not in the November 30, 2001 SGAT. Applicable sections read:

> 5.21.1 Any notices required by or concerning this Agreement shall be in writing and sent by certified mail, return receipt requested, to Qwest and CLEC at the addresses shown below

364. The wording "If personal delivery is selected to give notice, a receipt acknowledging such delivery must be obtained. Each Party shall inform the other of any

change in the above contact person and/or address using the method of notice called for in this Section 5.21." does not exist in the SGAT in this section.

365. Since Qwest agreed on May 15, 2001 to make the changes shown above , they should be incorporated in order for Qwest to comply with this SGAT section.

Section 5.23 – Responsibility of Each Party

366. Neither WorldCom nor AT&T commented on this section. Qwest proposes that the SGAT wording be retained as is.

Section 5.23

a) Qwest Position[146]

367. WorldCom proposes alternative language without an explanation of the benefits or differences in the SGAT. Although Qwest believes the "indiscriminate replacement" policy of WorldCom is counter to the purpose of the workshops and testimony, they agree to modify the SGAT to the WorldCom proposed language since the two are similar. The new language would read:

> 5.23.1 The provisions of this Agreement are for the benefit of the Parties and not for any other Person. This Agreement will not provide any Person not a Party to this Agreement with any remedy, claim, liability, reimbursement, claim of action, or other right in excess of those existing by reference in this Agreement.

Resolution

368. The November 15, 2001 SGAT Section 5.23 is totally different from that shown above. Since Qwest agreed to the above wording, it should incorporate it in the SGAT in order to comply with this section.

Section 5.24 – Referenced Documents

a) WorldCom Position[147]

369. Section 5.24 gives Qwest an apparent unilateral ability to modify documents incorporated into the SGAT. This section should be deleted as written for the reasons stated in the WorldCom discussion of Section 2.

[146] Qwest Rebuttal pgs 87-88
[147] WorldCom Supplemental pg 22

b) Qwest Position[148]

370. WorldCom argues that Section 5.24 of the SGAT allows Qwest a unilateral ability to modify documents incorporated into the SGAT. WorldCom suggests deleting Section 5.24. WorldCom's concerns have been addressed by Qwest's development and implementation of the CICMP. Therefore there is no need to delete Section 5.24.

Resolution

371. No changes were needed or made to the November 30, 2001 SGAT.

Section 5.25 – Publicity

372. Neither AT&T nor WorldCom provides any comments regarding SGAT 5.25. Qwest's proposes SGAT language should be retained.[149]

Section 5.26 – Executed in Counterparts

a) Qwest Position[150]

373. Qwest can discern no meaningful differences between WorldCom's counter proposal and the Qwest language. Qwest is amenable to either but does not offer language in the testimony.

Section 5.27 – Compliance

a) Qwest Position[151]

374. Regarding WorldCom's proposed counter language, Qwest does not object to WorldCom Sections 6.1 and 6.2 which deal with complying with the law and obtaining regulatory approvals. WorldCom's Section 6.3 is incorporated in Qwest's Section 2 and will be addressed there. WorldCom's Section 6.4 may be problematic if the intent is that Qwest has to obtain rights and privileges for WorldCom's placement of facilities related to such things as subloop unbundling. Qwest cites numerous cases showing that the obligation to obtain rights lies with the CLEC.

[148] Qwest Rebuttal pg 88
[149] Qwest Rebuttal pg 88
[150] Qwest Rebuttal pg 88
[151] Qwest Rebuttal pg 89

Section 5.28 – Compliance with Communications Assistance for Law Enforcement Act ("CALEA")

a) Qwest Position[152]

375. Neither AT&T nor WorldCom comments on this specific SGAT language. WorldCom proposes language under the heading, "20.3, Law Enforcement Interface." WorldCom's proposed language is out of place; issues relating to wiretaps are addressed generally in Sections 11.35, 11.36, and 11.37 of the SGAT. The SGAT specifically addresses "Law Enforcement Interface" in Section 11.35.

376. WorldCom's proposal to modify Section 11.35 is not acceptable because it suggests that Qwest's obligations with respect to pen register, trap and trace, wiretap or other lawful interception orders might extend to requests from the CLEC. Qwest contends this is not the case. Qwest states they will respond to lawful orders to provide assistance to law enforcement, but that assistance function does not extend to CLEC requests for assistance, except as otherwise required by a lawful order.

Section 5.29 – Cooperation

377. Neither AT&T nor WorldCom provides any comments regarding SGAT 5.29. Qwest proposes the SGAT language be retained.

Resolution

378. No changes to the November 30, 2001 SGAT sections 5.25 through 5.29 were needed or made.

Section 5.30 – Amendments

a) AT&T Position[153]

379. AT&T proposes a new section 5.30.1.1. The proposed language sets forth a process for amendments that calls for dispute resolution in the event the parties are unable to agree on an amendment.

> 5.30.1 When this document is being used as an Interconnection agreement, it can only be amended in writing, executed by the duly authorized representatives of the Parties.
>
> 5.30.1.1.1 Either party may request an amendment to this Agreement at any time by providing to the other party in writing information about the desired amendment and proposed

[152] Qwest Rebuttal pgs89-90
[153] AT&T Initial Comments pg 50

language changes. If the parties have not reached agreement on the requested amendment within sixty (60) calendar days after receipt of the request, either party may pursue resolution of the amendment through the dispute resolution provisions of this Agreement.

b) WorldCom Position[154]

380. WorldCom believes this section is already covered in 1.7 for which the following language is offered:

> 1.7 Following the date this SGAT is approved or allowed to take effect, Qwest may file amendments to this SGAT, which shall be approved or permitted to take effect pursuant to the Schedule for Review set forth in Section 252(f) of the Act. At the time any amendment is filed, the section amended shall be considered withdrawn, and no CLEC may adopt the section considered withdrawn following the filing of any amendment, even if such amendment has not yet been approved or allowed to take effect.

c) Qwest Position[155]

381. Qwest agrees with WorldCom's position in its testimony that this provision should be deleted because it is covered in Section 1.7. Also, Qwest would not object to adding AT&T's proposed language regarding going to dispute resolution after 60 days if the parties are unable to reach agreement on a requested amendment as a new Section 1.7.2.

382. Qwest is unwilling to adopt WorldCom's proposed language on Waivers because it is too restrictive.

383. The new Section 1.7.2 would read as follows:

> 1.7.2 Either Party may request an amendment to this Agreement at any time by providing to the other Party in writing information about the desired amendment and proposed language changes. If the Parties have not reached agreement on the requested amendment within sixty (60) calendar days after receipt of the

[154] WorldCom Schweider supplemental pg 4
[155] Qwest Rebuttal pg 90

request either Party may pursue resolution of the amendment through the Dispute Resolution provisions of this Agreement.

Resolution

384. No changes were made to the November 30, 2001 SGAT Section 5.30.1. Qwest should delete Section 5.30 and add the agreed upon WCom Section 1.7.2 wording in order to comply with these SGAT sections.

Section 5.31 – Entire Agreement

a) Qwest Position[156]

385. WorldCom's proposed language uses terms which are not used in the SGAT. Qwest would be agreeable to adding language that would refer to Exhibits and subordinate documents being included in the text. Most of the rest of WorldCom's proposal tracks closely with Qwest's.

386. The modified Section 5.31 would read as follows:

> 5.31.1 This Agreement, including all Exhibits and subordinate documents attached to it or referenced within, all of which are hereby incorporated herein, constitutes the entire agreement between Qwest and CLEC and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.

Resolution

387. The wording shown above is not incorporated in the November 30, 2001 SGAT. Qwest should include it in order to comply with this SGAT section. Actual SGAT wording is:

> 5.31.1 This Agreement constitutes the entire agreement between Qwest and CLEC and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.

[156] Qwest Rebuttal pg 91

Section 5.32 – Pick and Choose

a) WorldCom Position[157]

388. WorldCom states that section 5.32 has been replaced by Section 1.7 that is more specific and should be deleted.

b) Qwest Position[158]

389. Qwest proposes to delete this section since it belongs in the Template Negotiation Agreement. Pick and Choose is covered in Section 1.8 of the SGAT.

390. WorldCom's proposed language for this section regarding amendments is addressed in SGAT Section 1.7, Amendments and those regarding change in law, at SGAT Section 2.2.

Resolution

391. This section was removed from the SGAT.

SGAT Proposed Section 5. (new) - Retention of Records

a) AT&T Position[159]

392. AT&T requests that a new provision be added to the General Terms, Section 5. This provision would require that Qwest retain documents, data and other information relating to its performance under this Agreement for at least five years after the expiration of the Agreement. In the event of litigation, Qwest should further retain such documents, data and information for one year after conclusion of such litigation. Such documents, data and other information will be necessary to prove any claim a CLEC would seek to pursue against Qwest. Because Qwest is the entity in complete control over a large amount of relevant data and documentation, it is in a unique position to destroy or make untenable the CLEC's ability to defend itself against Qwest's poor service or anticompetitive tactics.

b) Qwest Position

393. Qwest did not comment on this AT&T suggestion. Records retention is governed by regulatory, other government and financial conventions and requirements.

Resolution

394. This section was not added.

[157] WorldCom Supplemental pg 22
[158] Qwest Rebuttal pg 92
[159] AT&T Supplemental pgs 8-9

SGAT Section 11 – Network Security

a) AT&T Position[160]

395. In Sections 11.12, 11.15 and 11.18, AT&T has proposed the addition of language that makes clear that Qwest can only impose on CLECs the level of safety or security requirements that Qwest applies to itself, including employees, agents and vendors. This topic was discussed at length in the collocation workshop and appropriately reflected in the collocation provisions of the SGAT (*see* Sections 8.2.1.8, 8.2.1.17, 8.2.1.18). Section 11 should be consistent with those sections. AT&T proposes the following:

> 11.12 When working on Qwest ICDF Frames or in Qwest equipment line-ups, CLEC employees, agents and vendors agree to adhere to Qwest quality and performance standards provided by, and adhered to by, Qwest and as specified in this Agreement.
>
> 11.15 CLEC employees will ensure adherence by its employees, agents and vendors to all Qwest environmental health and safety regulations, to the same degree that Qwest employees, agent and vendors adhere to such regulations. This includes all fire/life safety matters, OSHA, EPA, Federal, State and local regulations, including evacuation plans and indoor air quality.
>
> 11.18 CLEC's employees, agents and vendors will comply with Qwest Central Office fire and safety regulations, to the same extent Qwest employees, agents and vendors comply with the same, which include but are not limited to, wearing safety glasses in designated areas, keeping doors and aisles free and clean of trip hazards such as wire, checking ladders before moving, not leaving test equipment or tools on rolling ladders, not blocking doors open, providing safety straps and cones in installation areas, using electrostatic discharge protection, and exercising good housekeeping.

396. AT&T states that Sections 11.19 and 11.25 include language that gives Qwest the right to terminate a CLEC's right of access if certain activities occur. Qwest cannot have this unfettered right without a process that calls for notification, opportunity to cure the problem and the ability to get an independent decision from the Commission or through the dispute resolution process when the issues cannot be amicably resolved between the parties.

397. AT&T proposes the addition of language at the beginning of Section 11.22 to ensure that this section does not do anything to narrow the rights CLECs have under the collocation sections of the SGAT to conduct certain activities in their collocation space.

[160] AT&T Supplemental pg 9-11

> 11.22 Except as otherwise provided in this Agreement, CLEC's employees, agents or vendors may not make any modifications, alterations, additions or repairs to any space within the building or on the grounds.

398. Section 11.23 contains a very strong right in favor of Qwest to halt CLEC work, and it is not in complete concert with Sections 8.2.3.9 and 8.2.3.10 of the SGAT. Section 11.23 needs to be made consistent with these other provisions or deleted. If a modified Section 11.23 remains in the SGAT, the parties need to discuss the right the CLEC has to make a Qwest employee, agent or vendor stop a work activity that poses risk to CLEC personnel or property. Section 11.23 currently reads:

> 11.23 Qwest employees may request CLEC's employee, agent or vendor to stop any work activity that in their reasonable judgment is a jeopardy to personal safety or poses a potential for damage to the building, equipment of services within the facility.

399. Qwest should explain why, under Section 11.31, a CLEC is required to notify Qwest Service Assurance when gaining access to a Central Office after hours. CLECs have 7x24 access to their collocation space under Section 8.2.1.19 of the SGAT. That provision (appropriately) does not require this after-hours notification. It is inappropriate and creates a burden on CLECs' access. Section 11.31 should be deleted.

> ~~11.31 CLEC employees, agents and vendors will notify Qwest Service Assurance (800-713-3666) when gaining access into a Central Office after hours. Normal business hours are 7:00 a.m. to 5:00 p.m.~~

400. SGAT Section 11.37 language states that Qwest will not notify CLECs when performing a trap/trace or pen register assistance to law enforcement agencies because of non-disclosure considerations. Since the CLEC is the service provider of the end-user, AT&T wants the CLEC to be notified in all cases where it is permitted. In addition, AT&T wants Qwest to inform law enforcement agencies when these requests are made that a CLEC is the service provider, and as such, the CLEC should be involved in the process.

b) Qwest Position[161]

401. Qwest states that they addressed Section 11 in the introduction to the May 15, 2001 rebuttal testimony and that the section should be rejected because it is obsolete.

Resolution

403. The November 15, 2001 SGAT contains the Section 11 wording which Qwest reported on May 15,2001. AT&T suggested changes were not made. Qwest should

[161] Qwest Rebuttal pg 92

indicate whether it proposes to delete Section 11 or continue the November 15, 2001 language, in order to determine compliance.

SGAT Section 17 – Bona Fide Request Process ("BFR")

404. AT&T provided considerable testimony on the BFR in both Initial Comments and Supplemental Testimony. Qwest also provided considerable testimony in both rebuttal and supplemental testimony.

a) AT&T Position in Supplemental Testimony[163]

405. AT&T has serious concerns about the application of Qwest's BFR process. In addition to AT&T's basic concern about the length of time associated with such process, AT&T's experience shows that Qwest abuses this process to delay and impede acquisition by CLECs of services or products from Qwest. AT&T relates their negative experiences in detail.

406. AT&T states that the negative experience resulted from a request that: 1) was technically feasible, 2) existed in Qwest's network, 3) was for access provided for in AT&T's existing ICA, and 4) essentially bought time for Qwest to provide for the routing diversity which obviates the need for the request.

404. AT&T states that the Commission should require that Qwest add language to the SGAT that clearly states that any amendments to the SGAT sought by CLECs shall only include the terms that specifically and legitimately relate to the service being provided and shall not permit Qwest to require modifications to terms and conditions already contained in the SGAT.

b) Covad Position[164]

407. Covad is concerned with opportunities for Qwest to delay the provision of products or service requested pursuant by using the BFR process. Specifically, there is no time period by which Qwest may request the "necessary information" not contained in a CLEC's initial BFR form. The lack of specificity in the BFR builds in the opportunity for abuse by Qwest. Another area of concern is the fact that Qwest makes the determination of whether the requested product or service is technically feasible and whether it is required by the Act.

408. Covad suggests several requirements of Qwest regarding BFR. 1) Qwest should be obligated to provide all necessary back up documentation and support for the BFR quote it provides to CLECs at the time that quote is provided, and 2) Qwest also should be obligated to set an outside time limit by which it will provision the product or service requested by a CLEC pursuant to the BFR process.

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[162] Qwest rebuttal pg 92
[163] AT&T Supplemental pg 11
[164] Covad – Zukevic testimony on GT&C pgs 12-14

c) AT&T Position Initial Comments

409. Qwest's proposed BFR process is deficient. The deficiencies of Qwest's BFR process are both general and specific. A primary flaw of Qwest's BFR process is that it presupposes that the process to obtain certain types of interconnection or access to unbundled network elements "not already available" in the SGAT is clear. Nowhere in the BFR does Qwest commit itself to actually provisioning interconnection or access requested in a BFR application. Upon resolution of the dispute or agreement to offer such access or interconnection, Qwest should make such services immediately available to the CLEC without the need for any cumbersome "amendment" process.

410. Finally, Qwest should streamline the BRF process by: (1) explicitly acknowledging that previous forms of interconnection and access resolved through the BFR process or through the dispute resolution process throughout its 14-state region, would be presumptively binding on Qwest under the present SGAT without the need for further BFR or dispute resolution proceedings; and (2) determinations about technical feasibility made throughout the nation should create a rebuttable presumption on Qwest that such access or interconnection is technically feasible within its own network.

411. In section 17.2, Qwest specifies the content and nature of the "appropriate Qwest form for BFRs". Qwest's provision is ambiguous and affords Qwest the opportunity to treat CLECs in a discriminatory manner. Qwest should be required to attach, as an exhibit, the actual form to be used by Qwest. Section 17.4 should be revised to make reference to a specific BFR application form and eliminate the phrase "at a minimum".

Sections 17.2(g) and (h)[165]

412. It is for Qwest to deny access and specify its reasons. If a CLEC determines that Qwest's reasons are flawed or the denial is otherwise inappropriate, the CLEC should have an opportunity to make its case in dispute resolution. Sections 17.2(g) and (h) should be eliminated.

Section 17.3 [166]

413. Section 17.3 implies that additional information needed to complete the analysis of the BFR must be provided to Qwest for processing the application. Although AT&T would not oppose an obligation on the part of CLECs to cooperate with Qwest in good faith in the BFR process, AT&T opposes any implication that an application could be suspended or otherwise held up if, in Qwest's sole determination, the application is incomplete.

[165] AT&T Initial Comments pg 53
[166] AT&T Initial Comments pg 54

Sections 17.4, 17.5, 17.6[167]

414. Sections 17.4, 17.5 and 17.6, when read together, are unclear.

Sections 17.10[168]

415. Section 17.10 states that dispute resolution procedures are available under the Agreement. This provision should make clear that a dispute arising from the BFR process should be presumptively treated as if it had been escalated, so that the parties may disregard the escalation requirement of section 5.18 CLECs should have the option to have the disputes appealed directly to the Commission.

Sections 17.7 and 17.9[169]

416. Qwest specifies that certain "development costs" and construction charges will be assessed a requesting CLEC as part of the BFR process. Because requests for interconnection and access processed as a BFR will likely be made by more than one CLEC, such development costs should be shared among all requesting CLECs, not merely those bold enough to make the first request.

a) WorldCom Position[170] (SGAT Section 17 Bona Fide request Process)

417. WorldCom states that the BFR as proposed has unreasonable delays. They also note that the BFR is discussed in the section on Special Request Process.

Section 17.1

a) WorldCom Position

418. SGAT Section 17.1 should be modified to reflect that the BFR process will support requests for data base access or other network information.

Section 17.2

a) WorldCom Position

419. WorldCom opposes the Qwest information requirements found in Subsection 17.2 (g) and (h). WorldCom states that the information is not necessary for Qwest to provide access to an UNE and a CLEC should only be required to provide the technical details needed for a more detailed assessment or quote.

[167] AT&T Initial Comments pg 54
[168] AT&T Initial Comments pg 54
[169] AT&T Initial Comments pg 55
[170] WorldCom Supplemental pg 22-26

Section 17.3

a) WorldCom Position

420. WorldCom believes the proposed SGAT timeframes in section 17.3 are an unreasonable delay to CLECs attempting to complete the BFR process.

Sections 17.4, 17.5 and 17.6

a) WorldCom Position

421. Regarding Sections 17.4, 17.5 and 17.6, WorldCom believes the activity should be completed within 15 calendar days, not 21 days, and should include a cost estimate.

422. Language reflecting agreement between Qwest and WorldCom should be added to SGAT Section 17.7 as follows:

> In the event a CLEC has submitted a Request for an Interconnection, a Network Element or any combination thereof and Qwest determines in accordance with the provisions of this Section 17 that the request is technically feasible, subsequent requests or orders for the identical type of interconnection, network element or combination by that CLEC shall not be subject to the BFR or the Special Request Process. To the extent Qwest has deployed an identical network element or combination under a previous BFR, a subsequent BFR or Special Request Process shall be not required. Qwest may only require CLEC to complete a CLEC questionnaire before ordering such network elements or combinations thereof. For purposes of this Section 17.7, an "identical" request shall be one that is materially identical to a previous request with respect to the information provided pursuant to Subsections (a) through (e) of Section 17.2 above.

423. WorldCom suggests the following language for Section 17:

> 17.1 Any request for Interconnection or access to an unbundled network element or ancillary service that does ~~is~~ not ~~already available as described in other sections of this Agreement~~ occur anywhere in the Qwest network shall be treated as a Bona Fide Request (BFR). Qwest shall use the BFR Process to determine the terms and timetable for providing the requested Interconnection, access to UNEs or ancillary services, if such requested Interconnection, access to UNEs or ancillary services, or something substantially similar thereto does not occur anywhere in the Qwest network ~~available~~, and the technical feasibility of new/different points of Interconnection. The term "technical feasibility" refers solely to technical or operational concerns, rather than economic, space, or site considerations. The obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to Qwest's facilities to the extent

necessary to accommodate interconnection or access to network elements and the Act bars consideration of costs in determining technical feasible points of interconnection or access. Preexisting interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points. If CLEC disputes the technically feasible determination of Qwest, CLEC may immediately take the matter to the Commission and Qwest must prove to the Commission that the particular interconnection or access point the subject of the BFR request is not technically feasible. Qwest will administer the BFR Process in a non-discriminatory manner.

17.2 A BFR shall be submitted in writing and on the appropriate Qwest form for BFRs. CLEC and Qwest will work together to prepare the BFR form and Qwest shall provide such assistance in preparing the BFR form within 24 hours of CLEC's oral request for same. This form shall be accompanied by the ~~non-refundable~~ Processing Fee specified in Exhibit A of this Agreement. The form will request, and CLEC will need to provide, the following information, ~~as well as,~~ and may also provide any additional information that may be helpful in describing and analyzing CLEC's request:

(a) a technical description of each requested Network Element or new/different points of Interconnection or ancillary services, that are not offered to any other carrier or are not found in the Qwest network;

(b) the desired interface specification;

(c) each requested type of Interconnection or access;

(d) a statement that the Interconnection or Network Element or ancillary service will be used to provide a Telecommunications Service;

(e) the quantity requested;

(f) the specific location requested;

(g) if the requested unbundled network element is a proprietary element as specified in Section 251(d)(2) of the Act, or ~~CLEC must submit documentation that demonstrates that access to such Network Element is necessary, that the failure to provide access to such Network Element would impair the ability of CLEC to provide the services that it seeks to offer, and that CLEC's ability to compete would be significantly impaired or thwarted without access to such requested proprietary element; and~~

~~(h)~~ if the requested Unbundled Network Element is a non-

proprietary element as specified in Section 251(d)(2) of the Act, and the requested element is not required by the FCC or the Commission to be offered as a UNE, either Party may take the request to the Commission for expedited resolution of the request and Qwest having the burden of proof regarding the proprietary nature of the UNE. ~~CLEC must submit documentation that demonstrates that denial of access to such non proprietary unbundled network element would impair the ability of CLEC to provide the services that it seeks to offer, and that CLEC's ability to compete would be significantly impaired or thwarted without access to such unbundled network element.~~

17.3 Within fifteen (15) calendar days of its receipt, Qwest shall acknowledge receipt of the BFR and in such acknowledgment advise CLEC of missing information, if any, necessary to process the BFR. Thereafter, Qwest shall promptly advise CLEC of the need for any additional information required to complete the analysis of the BFR.

17.4 Within fifteen (15) calendar days of its receipt of the BFR and all information necessary to process it, Qwest shall provide to CLEC a preliminary analysis of the BFR. The preliminary analysis shall specify Qwest's conclusions as to whether or not the requested Interconnection or access to an unbundled network element complies with the unbundling requirements of the Act.

17.5 If Qwest determines during the fifteen (15) day period that a BFR does not qualify as an unbundled network element or Interconnection or ancillary service that is required to be provided under the Act, Qwest shall advise CLEC as soon as reasonably possible of that fact, and Qwest shall promptly, but in no case later than ten (10) calendar days after making such a determination, provide a detailed written report setting forth the basis for its conclusion.

17.6 If Qwest determines during the fifteen (15) day period that the BFR qualifies under the Act, it shall notify CLEC in writing of such determination within ten (10) calendar days.

17.7 As soon as feasible, but in any case within forty-five (45) calendar days after Qwest notifies CLEC that the BFR qualifies under the Act, Qwest shall provide to CLEC a BFR quote. The BFR quote will include, at a minimum, a description of each Interconnection, Network Element, and ancillary service, the quantity to be provided; any interface specifications, and the applicable rates (recurring and nonrecurring) including the separately stated development costs and construction charges of the Interconnection, unbundled network element or ancillary service and any minimum volume and term commitments required, and the timeframes the request will be provisioned.

17.8 A CLEC has sixty (60) ~~thirty (30)~~ business days upon receipt of the BFR quote, to either agree to purchase under the quoted price, cancel its BFR, or ~~seek mediation or arbitration~~ resolve the issue in accordance with the Dispute Resolution provisions of the Agreement.

17.9 If CLEC has agreed to minimum volume and term commitments under the preceding paragraph, CLEC may cancel the BFR or volume and term commitment at any time. ~~but in the event of such cancellation CLEC will pay Qwest's reasonable development costs incurred in providing the Interconnection, Unbundled Network Element, or ancillary service to the extent that those development costs are not otherwise amortized.~~

17.10 ~~If either Party believes that the other Party is not requesting, negotiating or processing any BFR in good faith, or disputes a determination or quoted price or cost, it may seek arbitration pursuant to the Dispute Resolution provision of this Agreement.~~ If CLEC believes that Qwest is not negotiating or processing a BFR in good faith, is failing to act in accordance with the Act, or CLEC disputes a determination of feasibility or availability or a price/cost quote, CLEC may seek immediate mediation or arbitration by the Commission, including the use of any available expedited procedures. The relief sought can include, but is not limited to, a determination that Qwest be required to provide the requested method, arrangement, or Network Element Combination. The full burden of proof in any such hearing, mediation, or arbitration is on Qwest to prove technical infeasibility.

17.11 All time intervals within which a response is required from one Party to another under this Section are maximum time intervals. Each Party agrees that it will provide all responses to the other Party as soon as the Party has the information and analysis required to respond, even if the time interval stated herein for a response is not over.

17.12 In handling a BFR pursuant to this section 17, Qwest shall, to the extent possible, utilize information from previously developed BFRs in order to shorten response times.

17.13 Once a BFR has been fully completed and Qwest has delivered the requested item or service sought, CLEC and Qwest agree that future requests by CLEC for the same item or services shall not require a BFR, the Special Request Process or an amendment to the Agreement.

17.14 Unless the Parties agree otherwise, a BFR under this section 17 must be priced in accordance with section 252(d)(1) of the Act, and any applicable FCC or Commission rules, regulations or orders.

17.15 The total cost charged to CLEC shall not exceed the BFR quoted price.

b) Qwest Position

Supplemental Testimony[171]

424. In Qwest's supplemental testimony, they provide more detail on the difference in use between the BFR and the ICB processes. Some of these are:

- The BFR is not used in lieu of the ICB process or the Special Request Process
- The ICB process is used to determine rates or provisioning intervals for services already in the SGAT
- The ICB does not require the analysis that the BFR does
- The BFR requires an analysis legal and technical feasibility analysis

Rebuttal Testimony

425. Qwest provides 12 pages of testimony in their rebuttal on the BFR. This report attempts to summarize that testimony and report on direct rebuttals to AT&T and WorldCom's concerns.

426. Qwest points out that since 1999 they have received only two BFR requests, neither of which was from WorldCom or AT&T. To answer WorldCom concerns about long delays, Qwest offers up a comparison to BellSouth and Bell Atlantic who have been given 271 approval. Qwest also notes that they have reduced this timeline in its proposed language in the Arizona SGAT to a Preliminary Feasibility response in 21 days and a Quote in an additional 45 days. Qwest disagrees with WorldCom's unsupported suggestion that this timeline be further reduced to 15 days.

427. WorldCom seeks a provision that Qwest acknowledge receipt of a BFR request within 48 hours. Qwest is agreeable to acknowledging receipt of a BFR request within two business days and will modify the SGAT language accordingly. WorldCom also seeks weekly updates on the status of the BFR. Qwest is agreeable to providing such weekly status updates.

428. Section 17.7 of the SGAT provides for 45 days to prepare the price quote. This timeline must remain for the reasons stated above. Qwest can, however, agree to WorldCom's language with some necessary changes. The new Section 17.12 would read as follows:

> 17.12 In the event CLEC has submitted a Request for an Interconnection, a network element or any combination thereof and Qwest determines in accordance with the provisions of this Section 17 that the request is technically feasible, subsequent requests or

[171] Qwest Supplemental pgs 9-10

orders for the identical type of Interconnection, network element or combination by that CLEC shall not be subject to the BFR Process. To the extent Qwest has deployed an identical network element or combination under a previous BFR, a subsequent BFR shall be not required. Qwest may only require CLEC to complete a CLEC questionnaire before ordering such network elements or combinations thereof. ICB Pricing and intervals will still apply for requests that are not yet standard offerings. For purposes of this Section 17.12, an "identical" request shall be one that is materially identical to a previous request with respect to the information provided pursuant to Subsections (a) through (f) of Section 17.2 above.

429. Regarding the WorldCom request that the BFR process be modified to include requests for access to databases and/or network information, Qwest does not object to the use of the BFR process for requests for unique, non-standard access to the commercial databases that are offered as UNEs by Qwest. However, the BFR process is not the appropriate process for access to internal databases. Access to such databases is handled through the IMA/EDI Interfaces and the CICMP process.

430. WorldCom opposes the requirements found in 17.2(g) and (h). The documentation at issue, however, is grounded in the Act and the UNE Remand Order, which prescribe specific tests for the unbundling of proprietary and nonproprietary unbundled network elements. While Qwest believes that a CLEC should be willing to provide the documentation demonstrating that its request for the UNE meets the tests specified under the Act, Qwest is willing to drop its request for the documentation from the CLEC. WorldCom's proposed limitation of the charge for performing the BFR analysis to $200 under certain circumstances, is unreasonable and should be rejected along with the reference that would permit WorldCom to avoid the costs of preparing the BFR.

431. WorldCom's Section 24.6 deals with a dual step process that is inappropriate since only one BFR process is necessary. WorldCom's proposed language in Section 24.9 is agreeable in principle to Qwest. The language is addressed in the Special Request Process. The section is too broad and specific qualifying language is necessary to define an "identical request."

432. In Section 24.11 and Section 24.12, WorldCom appears to be adding a dispute resolution clause to the BFR process. Qwest is agreeable to a dispute resolution process but it is not necessary to add such language after each product or service. If WorldCom continues to request a dispute resolution provision here, Qwest will add language to this section.

433. Qwest then addresses AT&T's comments about general deficiencies, specific deficiencies, and a particular Oregon BFR request.

434. Qwest first addresses the AT&T general statements that the process is deficient and too lengthy. AT&T fails to address the specific steps of the process that Qwest must go through to complete a BFR. AT&T is also concerned with disputes as to whether a request is for a service or product already provided in the SGAT. But AT&T offers no concession to the possibility of good faith disputes. The SGAT provides for dispute resolution.

435. AT&T's requested accommodation for "minor" requests has been responded to in the workshops by offering the Special Request Process.

436. AT&T also raises concern that Qwest makes no affirmative statement that having provided the quote for the requested UNE or interconnection, Qwest will provide the requested UNE or interconnection element. Qwest will agree to provide the element requested in the BFR if it qualifies.

437. As to specific timetables, implementation of a BFR begins upon acceptance by the CLEC.

438. With respect to AT&T's concerns about earlier acknowledgement that a request has been received, these concerns were addressed in response to the WorldCom comments. Qwest is agreeable to a 48 hour notification. Each request, however, is unique. A particular request may be more complicated and require a longer analysis to determine if additional information is needed. Qwest will abide by the timelines in Section 17.

439. As to AT&T's general comment that once a previous BFR has been approved, no further BFRs need be submitted for similar requests. Qwest has addressed this in response to similar arguments by WorldCom. Not all equipment configurations are the same in all locations and not all switches have the same interfaces or software loads or even the same manufacturer. The issue centers around whether the request truly is identical to a previously approved BFR. If the request is similar in many respects, the evaluation and costing process will go much faster. And as Qwest has committed in Section 17.11, if Qwest is able to provide the response sooner, it will.

440. Regarding AT&T's specific concerns, the form for requesting a BFR is on the Qwest web site for CLECs at:

www.qwest.com/wholesale/preorder/bfrsrprocess.html.

441. AT&T voices concern over Qwest's use of the term 'preliminary' analysis in Section 17.4. Qwest is agreeable to striking the word 'preliminary' in 17.4. As for the striking the escalation process in Section 5.18, Qwest believes that escalation to senior officers in the respective companies often avoids or resolves problems quickly between the companies. The new Section 17.4 would read as follows:

> 17.4 Within twenty-one (21) calendar days of its receipt of the BFR and all information necessary to process it, Qwest shall provide to CLEC an analysis of the BFR. The ~~preliminary~~ analysis

shall specify Qwest's conclusions as to whether or not the requested Interconnection or access to an unbundled network element complies with the unbundling requirements of the Act or state law.

442. Qwest provides a detailed response to AT&T's example of a BFR in Oregon. The Qwest version of the process gives a different accounting.

443. Regarding AT&T's charges that Qwest has not yet implemented its BFR or provided a delivery date, Qwest provided AT&T with a quote on March 30, 2001 that states orders can be processed upon acceptance of terms and rates in the quote letter. AT&T has not yet accepted the quote to proceed with its order. Qwest is willing to proceed with AT&T's request. AT&T has itself delayed the implementation.

Resolution

444. There were a number of changes and iterations of testimony on BFR. To simplify the resolution section, the final resolved section is shown below rather than discussing each change separately. However, it is noted that Qwest omitted section 17.12 from the November 30, 2001 SGAT, and should insert it in order to be fully compliant with this SGAT section. The balance of the section conforms to the version proposed and agreed upon on May 15, 2001.

Section 17.0 - BONA FIDE REQUEST PROCESS

17.1 Any request for Interconnection or access to an Unbundled Network Element or ancillary service that is not already available as described in other sections of this Agreement shall be treated as a Bona Fide Request (BFR). Qwest shall use the BFR Process to determine the terms and timetable for providing the requested Interconnection, access to UNEs or ancillary services, if available, and the technical feasibility of new/different points of Interconnection. Qwest will administer the BFR Process in a non-discriminatory manner.

17.2 A BFR shall be submitted in writing and on the appropriate Qwest form for BFRs. CLEC and Qwest will work together to prepare the BFR form. This form shall be accompanied by the non-refundable Processing Fee specified in Exhibit A of this Agreement. The form will request, and CLEC will need to provide, the following information, as well as, any additional information that may be helpful in describing and analyzing CLEC's request:

a) a technical description of each requested Network Element or new/different points of Interconnection or

ancillary services;

b) the desired interface specification;

c) each requested type of Interconnection or access;

d) a statement that the Interconnection or Network Element or ancillary service will be used to provide a Telecommunications Service;

e) the quantity requested;

f) the specific location requested;

g) if the requested Unbundled Network Element is a proprietary element as specified in Section 251(d)(2) of the Act, CLEC must submit documentation that demonstrates that access to such Network Element is necessary, that the failure to provide access to such Network Element would impair the ability of CLEC to provide the services that it seeks to offer, and that CLEC's ability to compete would be significantly impaired or thwarted without access to such requested proprietary element; and

h) if the requested Unbundled Network Element is a non-proprietary element as specified in Section 251(d)(2) of the Act, CLEC must submit documentation that demonstrates that denial of access to such non-proprietary Unbundled Network Element would impair the ability of CLEC to provide the services that it seeks to offer, and that CLEC's ability to compete would be significantly impaired or thwarted without access to such Unbundled Network Element.

17.3 Within fifteen (15) calendar days of its receipt, Qwest shall acknowledge receipt of the BFR and in such acknowledgment advise CLEC of missing information, if any, necessary to process the BFR. Thereafter, Qwest shall promptly advise CLEC of the need for any additional information required to complete the analysis of the BFR.

17.4 Within twenty-one (21) calendar days of its receipt of the BFR and all information necessary to process it, Qwest shall provide to CLEC a preliminary analysis of the BFR. The preliminary analysis shall specify Qwest's conclusions as to whether or not the requested Interconnection or access to an Unbundled Network Element complies with the unbundling requirements of the Act.

17.5 If Qwest determines during the twenty-one (21) day period that a BFR does not qualify as an Unbundled Network Element or Interconnection or ancillary service that is required to be provided under the Act, Qwest shall advise CLEC as soon as reasonably possible of that fact, and Qwest shall promptly, but in no case later than ten (10) calendar days after making such a determination, provide a written report setting forth the basis for its conclusion.

17.6 If Qwest determines during the twenty-one (21) day period that the BFR qualifies under the Act, it shall notify CLEC in writing of such determination within ten (10) calendar days.

17.7 As soon as feasible, but in any case within forty-five (45) calendar days after Qwest notifies CLEC that the BFR qualifies under the Act, Qwest shall provide to CLEC a BFR quote. The BFR quote will include, at a minimum, a description of each Interconnection, Network Element, and ancillary service, the quantity to be provided, any interface specifications, and the applicable rates (recurring and nonrecurring) including the separately stated development costs and construction charges of the Interconnection, Unbundled Network Element or ancillary service and any minimum volume and term commitments required, and the timeframes the request will be provisioned.

17.8 A CLEC has thirty (30) business days upon receipt of the BFR quote, to either agree to purchase under the quoted price, cancel its BFR, or seek mediation or arbitration.

17.9 If CLEC has agreed to minimum volume and term commitments under the preceding paragraph, CLEC may cancel the BFR or volume and term commitment at any time, but in the event of such cancellation CLEC will pay Qwest's reasonable development costs incurred in providing the Interconnection, Unbundled Network Element, or ancillary service to the extent that those development costs are not otherwise amortized.

17.10 If either Party believes that the other Party is not requesting, negotiating or processing any BFR in good faith, or disputes a determination or quoted price or cost, it may seek arbitration pursuant to the Dispute Resolution provision of this Agreement.

17.11 All time intervals within which a response is required from one Party to another under this Section are maximum time intervals. Each Party agrees that it will provide all responses to the other Party as soon as the Party has the information and analysis

required to respond, even if the time interval stated herein for a response is not over.

Exhibit F – Special Request Process (SRP)

a) AT&T Position[175]

445. AT&T states that Qwest's testimony provides an illustration of why "productization" is a problem for CLECs. When referring to the Special Request Process, Qwest states that the SRP is designed "for unbundled network elements that have been defined by the FCC or this Commission as a network element to which Qwest must provide unbundled access but for which Qwest has not created a standard product"[176] (this is also reflected in paragraph 1.d of Exhibit F). AT&T interprets this to mean that Qwest has an obligation under the Act. The CLEC has an interconnection agreement and yet the CLEC has to go through an ill-defined process to get Qwest to perform. The SRP does not include an analysis into technical feasibility or the necessary and impair standard. If the Commission determines that such a process is warranted in the first instance, the process should be quick and better defined.

446. First, Qwest's standard for determining whether a "product" may be offered is too vague. Second, the intervals are uncertain because one never seems to know when Qwest will bump a special request into the BFR process. In addition, the SRP intervals are incomplete.

447. Regarding Qwest Exhibit F, it is not clear from this Exhibit what happens if a CLEC submits a Special Request and then Qwest determines that the BFR process needs to be followed. More specifically, will Qwest continue the process and treat it as a BFR without making the CLEC go back to the beginning of the BFR process?

448. CLEC should not be penalized as to the time it takes to get a meaningful answer from Qwest simply because it submitted a Special Request that Qwest considers subject to the BFR process.

449. Qwest should explain how it came up with the list of items in paragraph 2 to which Qwest expects to apply the BFR process. The form used for a Special Request should be attached as an exhibit to the SGAT. This form should not be changeable by Qwest unilaterally. Paragraphs 4 and 5 of Exhibit F make reference to two intervals: (i) five business days for Qwest to acknowledge receipt of a Special Request, and (ii) fifteen business days for a preliminary analysis from Qwest. The Exhibit has no statement of processes or intervals after the preliminary analysis. Qwest needs to spell out each step in this process and the timeline associated with each. CLECs cannot evaluate the

[172] AT&T Initial Comments pg 57
[173] Covad - Zulevic testimony pg 19
[174] Qwest Supplemental pgs 9-10
[175] AT&T Supplemental pgs 13-17
[176] Supplemental Affidavit of Larry Brotherson, filed May 11, 2001, at p. 8

propriety of this process without such information. Paragraph 6 gives Qwest an out from meeting the timeframes of the SRP for "extraordinary circumstances". This provision should be stricken.

b) **WorldCom Position**[177]

450. WorldCom proposes the following without comment.

Special Request Process

1. The Special Request Process shall be used for the following requests:

a. Requesting specific product feature(s) be made available by Qwest that are currently available in a switch, but which are not activated.

b. Requesting specific product feature(s) be made available by Qwest that are not currently available in a switch, but which are available from the switch vendor.

c. Requesting a combination of Unbundled Network Elements that is a combination not currently offered by Qwest as a standard product and:

i. that is made up of UNEs that are defined by the FCC or the Commission as a network element to which Qwest is obligated to provide unbundled access, ~~Qwest as products,~~ and; (This has been agreed to by Qwest)

ii. that is made up of UNEs that are ordinarily combined in the Qwest network.

d. Requesting an Unbundled Network Element that has been defined by the FCC or the State Commission as a network element to which Qwest is obligated to provide unbundled access, but for which Qwest has not created a standard product, including OC-192 UDIT and EEL between OC-3 and OC-192.

2. Any request that requires an analysis of technical feasibility shall be treated as a Bona Fide Request (BFR), and will follow the BFR Process set forth in this Agreement. The BFR process shall be used for, among other things, the following:

[177] WorldCom Supplemental pgs 27-29

~~a. Requests for Interconnection not already available as described in this Agreement,~~

c. Requests for access to an unbundled network element that has not been defined by the FCC or the State Commission as a network element to which Qwest is obligated to provide unbundled access,

d. Requests for UDIT and EEL above the OC-192 level, unless existing in Qwest's network and technically feasible,

~~d Requests for combinations of Unbundled Network Elements that include UNEs that are not defined by Qwest as products, and~~

e. Requests for combinations of Unbundled Network Elements that are not ordinarily ~~currently~~ combined in the Qwest network.

3. A Special Request shall be submitted in writing and on the appropriate Qwest form, which is located on Qwest's website. The form must be completely filled out.

4. Qwest shall acknowledge receipt of the Special Request within five (5) business days of receipt.

5. Qwest shall respond with a preliminary analysis, including costs and timeframes, within fifteen (15) business days of receipt of the Special Request. In the case of UNE combinations, the preliminary analysis shall include whether the requested combination is a combination of elements that are ordinarily combined in the Qwest network. If the request is for a combination of elements that are not ordinarily combined in the Qwest network, the preliminary analysis shall indicate to CLEC that it should use the BFR process if CLEC elects to pursue its request.

6. All timeframes will be met unless extraordinary circumstances arise. In such a situation, CLEC and Qwest will negotiate a reasonable response timeframe.

c) Qwest Position[178]

451. Qwest compares and contrasts BFR, SRP, and ICB, as follows:[179]

[178] Qwest Supplemental pgs 9-10, Qwest Rebuttal pgs 104-105

> The BFR process allows a CLEC to request an interconnection service, access to an unbundled network element or ancillary service that is not already available in the SGAT. The BFR is not used in lieu of the ICB process. The ICB process is used to determine rates or provisioning intervals for services already available in the SGAT. The ICB process does not require the analysis that a service requested through the BFR process requires.

452. The BFR is also not used in lieu of the Special Request process. The Special Request process is designed for requests for additional switch features that are currently available in a switch or can be available from the switch vendor, for combinations of defined unbundled network elements that Qwest is not currently offering as standard products, and for unbundled network elements that have been defined by the FCC or this Commission as a network element to which Qwest must provide unbundled access but for which Qwest has not created a standard product. The BFR process requires analysis for technical feasibility and for legal analysis to determine whether the requested service is required under the Act.

453. The Wholesale Product Development Guide has been updated to incorporate a description of when the Special Request Process is used. The relevant pages of the Wholesale Product Development Guide are located, under the BFR Special Request tab at:

www.qwest.com/wholesale/preorder/

454. AT&T also requests that Qwest not be allowed to "bounce" a request submitted by AT&T from the Special Request Process to the Bona Fide Request Process. Until a request has been investigated, Qwest may not know if it qualifies as a Special Request or if it must go through the BFR process. However if it is determined that a request should have been submitted through the BFR process, Qwest will consider the BFR clock to have started upon receipt of the original Special Request application form, and will utilize any information uncovered during the initial review.

Resolution

455. Qwest's proposed Special Request Process is provided in Exhibit F of the November 30, 2001 SGAT. It incorporates WCom and AT&T suggestions in part. The SRP application form was provided on May 15, 2001, and should be incorporated as an exhibit in the SGAT in order to be compliant with this Section

[179]/ Pages 9 & 10 - Brotherson affidavit

Forecasting

a) AT&T Position[180]

456. Qwest has stated on the record in previous workshops that it has or will withdraw all forecasting obligations aside from those already addressed in the interconnection and collocation sections of the SGAT. Based on these statements, AT&T is acting on reliance upon Qwest to withdraw all such forecasting requirements. Because Qwest has apparently refiled its forecasting information here, it is appropriate for Qwest to reconfirm its previous withdrawal of all forecasting obligations (except those related to interconnection and collocation) that are on the record here.

457. AT&T has offered additional language for section 5.16 of the SGAT to specifically deal with confidentiality concerns around CLECs' provision of forecasts to Qwest regarding the right to audit Qwest processes, including the use of forecasts.

458. AT&T has objected to the requirements of section 7.2.2.8.6.1 of the SGAT in previous workshops and continues to object to this requirement. AT&T has addressed its concern in its brief on interconnection and collocation.

b) Covad Position[181]

459. Covad acknowledges that forecasts are appropriate if Qwest can demonstrate an actual need for such forecasts. Covad suggests that any forecast requirement should be carefully reviewed to ensure that it may not impose an unfair and anti-competitive burden on the CLECs. To this end, Covad suggests the forecasts be:

- As narrowly tailored as possible - Qwest should be permitted to require in a forecast only that information which is necessary for the provisioning of service and the deployment of sufficient network capacity
- Easy to complete - it is critical that the forecast form be easy both to understand and to complete in order to avoid the inclusion of inaccurate information as a result of a confusing form
- Submitted only on a bi-annual basis. These forecast are a significant burden on Covad and forecasts submitted more frequent are of minimal value due to the changes that will be made to them.
- Matched with an equally commensurate obligation on the part of Qwest to use the forecasts. Requiring Qwest to

[180] AT&T Initial Comments Pgs 62-63
[181] Covad - Zukevic testimony on GT&C pgs 4-12

demonstrate and actually act upon a forecast is reasonable, given Qwest's articulated rationale for requiring a forecast.

- Subject to strict requirements designed to ensure the confidentiality of the information contained in the forecasts. Covad has significant concerns regarding improper use by Qwest of the forecasted information for Qwest's own competitive purposes. Covad desires strict controls over who may view the forecasts, non-disclosure agreements and penalties for failure to comply with forecasting confidentiality processes.

460. Covad points to an existing situation as a reason for their concerns. Covad currently provides a quarterly UNE forecast broken down to the wire center level which is a significant burden on Covad. Covad does not feel that this forecast has improved Qwest's ability to meet the forecast or has service improved.

461. Covad also challenges Qwest's ability or right to condition the interval for collocation on the submission of a forecast. Covad also desires forecast reciprocity whereby a process is put into place for Qwest to share network plans with CLECs.

462. Finally, Covad has some other miscellaneous issues with forecasting. Covad would like clarification regarding SGAT § 7.2.2.8.6 and, specifically, the pro rata calculation. Covad is also interested in pursuing whether Qwest will agree to accommodate, act upon, and keep confidential voluntary CLEC forecasts for UNEs. To the extent Qwest will accommodate and act upon voluntary UNE forecasts, Covad requests clarification as to whether Qwest will agree both to act on such forecasts and to provide CLECs with its forecasts to permit them to focus intelligently on their marketing efforts.

c) Qwest Position[182]

463. Forecasting has been resolved to the satisfaction of parties in the workshops and should not be addressed here.

Resolution

464. As Qwest states, Forecasting was removed from General Terms and Conditions, debated as a standalone issue, and resolved separately from General Terms and Conditions.

[182] Qwest rebuttal pg 113

Section 18 – Audit Process

a) AT&T Position[183]

465. AT&T fails to understand why Qwest needs to have the right to audit CLECs. Qwest is in the position to have information that the customer and the CLEC need to verify performance and billing matters. AT&T believes this sections audit rights should be granted to the CLEC, but not to Qwest.

466. Section 18.1 states that an audit means a review of data relating to certain things like billing, provisioning and maintenance. AT&T feels that this is too narrow and that CLECs should also have the right to audit other aspects of Qwest's performance, including its processes and adherence to contract obligations. AT&T also wants the right to audit Qwest's handling of CLEC forecasts at any time

467. Section 18.2.4 provides that no more than two audits may be requested in any 12 month period. AT&T requests that a calendar year be used rather than a 12 month period. Also, two audits per year may be insufficient if an error is found that needs to be monitored to ensure that it has been remedied by Qwest. AT&T requests the following language be added:

> CLEC may audit Qwest's books, records and documents more frequently than twice during any calendar year (but no more frequently than once in each calendar quarter) if the immediately preceding audit found previously uncorrected net variances, inaccuracies or errors in invoices in Qwest's favor with an aggregate value of at least two percent (2%) of the amounts payable by CLEC for services, Interconnection or Network Elements provided during the period covered by the Audit.

468. Section 18.2.7 limits the audit to transactions that occurred in the last 24 months. AT&T submits that this time period is insufficient. The appropriate period of time is the statute of limitations for contractual disputes in the State, which is 3 years.

469. AT&T requests that section 18.2.8 be amended to add the following language:

> Qwest will reimburse CLEC for its expenses in the event that an Audit finds that an adjustment should be made in the charges or in any invoice paid or payable by CLEC hereunder by an amount that is, on an annualized basis, greater than two percent (2%) of the aggregate charges for the services, Interconnection, and Network Elements during the period covered by the Audit.

470. Section 18.2.9 provides that an audit may be conducted by a mutually agreed-to independent auditor, to be paid for by the requesting party. AT&T fails to

[183] AT&T Initial Comments pgs 57-59

understand why Qwest should have the right to agree to the independent auditor if the cost is paid by the CLEC. The phrase "mutually agreed-to" should be deleted.

471. Section 18.2.11 should be amended so that the parties' disputes regarding audit results will be handled under the dispute resolution section of the SGAT.

b) Qwest Position[184]

472. The reason Qwest should have the right to audit CLECs is that both Qwest and the CLECs currently engage in reciprocal exchange of traffic for local and access traffic, which generally is billed by the terminating party. Qwest has the same interests and concerns about the CLECs' billing accuracy and processes as the CLECs have concerning those of Qwest, which is why the right to audit should be reciprocal.

473. Qwest believes that the scope of the audit provision is appropriate and not too narrow as stated by AT&T. The dispute resolution process can be utilized for other questions regarding performance under the Agreement as well as the PIDs. AT&T's concerns about the treatment of forecasting information has been addressed in the discussion above concerning the Nondisclosure section of the SGAT (Section 5.16) as well as in other workshops. AT&T's concern about confidential handling of LSRs also is addressed by the Nondisclosure provisions of the SGAT.

474. AT&T also requests that a calendar year be used rather than a 12-month period and expresses concern that two audits per year may be insufficient if an error is found that needs to be monitored to ensure that Qwest has corrected it. AT&T's proposal for a "calendar year" basis would deny a potential second audit if a problem was found near the end of a calendar year, but is not particularly objectionable to Qwest. Qwest does not object to more frequent audits under the circumstances to which AT&T refers, but any audit language must be reciprocal to give both parties equal audit rights. When both parties have equal and reciprocal audit rights, the tendency of one party to request an unreasonable number of audits is self-policing.

475. AT&T suggests that the appropriate period of time is the statute of limitations for contractual disputes, which is three years in Arizona. Two years is the time period that Qwest uses for determining how far back it can bill to collect payment of interstate charges. The FCC and the industry have accepted this period. Two years is a reasonable time to discover a problem and request an audit.

476. AT&T requests that Section 18.2.8 be amended to add language to reflect that Qwest should reimburse a CLEC for its expenses in the event that an audit finds that an adjustment should be made to the charges. The costs of the audit should be borne by the requesting party since it is initiating the action. Also, AT&T's proposed language does not make clear whether the "aggregate" AT&T wants to use to determine whether expenses should be reimbursed applies to each category listed or to the sum of the categories listed. Its proposal should be rejected.

[184] Qwest Rebuttal pgs. 105-112

477. Qwest should have the right to agree to the independent auditor if the cost is to be paid by the CLEC because both parties will be impacted by the ultimate findings of the audit.

478. AT&T requests that Section 18.2.11 be amended so that the parties' disputes regarding audit results will be handled under the dispute resolution section of the SGAT. Qwest agrees to this change.

479. Responding to WorldCom's proposed provisions. First as stated above, audit rights must be reciprocal.

480. WorldCom requests four audits per year in their suggested language. With the exception of the circumstances addressed by AT&T, the number of audits should remain at two per twelve-month period due to the resources required to conduct a full audit. Qwest is willing to use WorldCom's definition for Examinations in this section and WorldCom's frequency for "Examinations," as these conform to general practice.

481. With respect to WorldCom wanting to expand the scope of audits to include performance standards, the PIDs process will adequately address this area. Qwest agrees to the last sentence of this section regarding providing appropriate support for the audit and examinations so long as the obligation is reciprocal.

482. Qwest agrees with the first three sentences in WorldCom's proposed Section 22.3 regarding which party bears certain costs. However, Qwest cannot agree with the last sentence, which would require Qwest to bear the costs where the adjustment on an annualized base is greater than one percent of the aggregate charges for all services.

483. Qwest does not believe that the language contained in WorldCom's proposed Section 22.4 regarding how adjustments are handled is appropriate. Qwest can accept the language contained in WorldCom's proposed Section 22.5 regarding restrictive statements on checks or otherwise.

484. Qwest agrees with the language in WorldCom's proposed Section 22 regarding the section surviving for two years after the termination of the Agreement, despite the existence of general survivability provisions because of the unique nature of the audit provisions.

485. The new Section 18 would read as follows:

Section 18.0 - AUDIT PROCESS

18.1 "Audit" shall mean the comprehensive review of:

18.1.1 Data used in the billing process for services performed, including reciprocal compensation, and facilities provided under this Agreement; and

18.1.2 Data relevant to provisioning and maintenance for

services performed or facilities provided by either of the Parties for itself or others that are similar to the services performed or facilities provided under this Agreement for Interconnection or access to unbundled loops, ancillary and finished services.

18.1.3 "Examination" shall mean an inquiry into a specific element of or process related to the above. Commencing on the Effective Date of this Agreement, either Party may perform Examinations as either Party deems necessary.

18.2 The data referred to above shall be relevant to any performance indicators that are adopted in connection with this Agreement, through negotiation, arbitration or otherwise. This Audit shall take place under the following conditions:

18.2.1 Either Party may request to perform an Audit.

18.2.2 The Audit shall occur upon thirty (30) business days written notice by the requesting Party to the non-requesting Party.

18.2.3 The Audit shall occur during normal business hours.

18.2.4 There shall be no more than two Audits requested by each Party under this Agreement in any 12-month period. Either Party may audit the other Party's books, records and documents more frequently than twice in any twelve (12) month period (but no more than once in each quarter) if the immediately preceding audit found previously uncorrected net variances, inaccuracies or errors in invoices in the audited Party's favor with an aggregate value of at least two percent (2%) of the amounts payable for the affected services during the period covered by the Audit.

18.2.5 The requesting Party may review the non-requesting Party's records, books and documents, as may reasonably contain information relevant to the operation of this Agreement.

18.2.6 The location of the Audit shall be the location where the requested records, books and documents are retained in the normal course of business.

18.2.7 All transactions under this Agreement which are over twenty-four (24) months old will be considered accepted and no longer subject to Audit. The Parties agree to retain records of all transactions under this Agreement for at least 24 months.

18.2.8 Each Party shall bear its own expenses in connection with conduct of the Audit or Examination. The

requesting Party will pay for the reasonable cost of special data extractions required by the Party to conduct the Audit or Examination. For purposes of this section, a "Special Data Extraction" means the creation of an output record or informational report (from existing data files) that is not created in the normal course of business. If any program is developed to the requesting Party's specification and at that Party's expense, the requesting Party will specify at the time of request whether the program is to be retained by the other Party for reuse for any subsequent Audit or Examination.

18.2.9 The Party requesting the Audit may request that an Audit be conducted by a mutually agreed-to independent auditor. Under this circumstance, the costs of the independent auditor shall be paid for by the Party requesting the Audit.

18.2.10 In the event that the non-requesting Party requests that the Audit be performed by an independent auditor, the Parties shall mutually agree to the selection of the independent auditor. Under this circumstance, the costs of the independent auditor shall be shared equally by the Parties.

18.2.11 The Parties agree that if an Audit discloses error(s), the Party responsible for the error(s) shall, in a timely manner, undertake corrective action for such error(s). All errors not corrected within thirty (30) business days shall be resolved pursuant to the Dispute Resolution Process.

18.2.12 Neither the right to examine and audit nor the right to receive an adjustment will be affected by any statement to the contrary appearing on checks or otherwise, unless the statement expressly waiving the right appears in writing, is signed by the authorized representative of the Party having that right, and is delivered to the other Party in a manner sanctioned by this Agreement.

18.2.13 This Section will survive expiration or termination of this Agreement for a period of two years after expiration of termination of the Agreement.

18.3 All information received or reviewed by the requesting Party or the independent auditor in connection with the Audit is to be considered Proprietary Information as defined by this Agreement. The non-requesting Party reserves the right to require any non-employee who is involved directly or indirectly in any Audit or the resolution of its findings as described above to execute a nondisclosure agreement satisfactory to the non-requesting Party. To the extent an Audit involves access to

information of other competitors, CLEC and Qwest will aggregate such competitors' data before release to the other Party, to insure the protection of the proprietary nature of information of other competitors. To the extent a competitor is an affiliate of the Party being audited (including itself and its subsidiaries), the Parties shall be allowed to examine such affiliates' disaggregated data, as required by reasonable needs of the Audit.

Resolution

486. The November 30, 2001 SGAT appears as Qwest states above with the following exceptions:

Section 18.1.3 was removed entirely. Section 18.2.4 now reads:

> 18.2.4 There shall be no more than two Audits requested by each Party under this Agreement in any 12-month period.

Section 18.2.8 now reads:

> 18.2.8 Each Party shall bear its own expenses occasioned by the Audit, provided that the expense of any special data collection shall be born by the requesting Party.

And section 18.2.11 reads:

> 18.2.11 The Parties agree that if an Audit discloses error(s), the Party responsible for the error(s) shall, in a timely manner, undertake corrective action for such error(s). All errors not corrected within thirty (30) business days shall be escalated to the Vice-President level.

Section 19 – Construction Charges

487. Neither AT&T nor WorldCom provides any comments regarding SGAT 5.22. The Qwest position is that SGAT language should be retained.

Resolution

488. Staff concurs with Qwest

Section 20 – Service Performance

a) Qwest Position[185]

489. WorldCom has proposed the addition of language that states that Qwest will become bound by the newly developed performance measures on the date of the Commission order implementing the same. Qwest is agreeable to this change. Section 20.1 would read as follows:

> 20.1 Qwest is currently developing performance measures in a Qwest workshop process being conducted by the Commission. Qwest will become bound by the newly developed performance measures on the date of the Commission order implementing the same and amend this Agreement when the Commission's Performance Measures Effort is complete, to incorporate all aspects of the Commission's final decision.

Resolution

490. This wording appears in the November 30, 2001 SGAT

Miscellaneous Issues Raised by WorldCom and AT&T[186]

(Resolution of Miscellaneous Issues a) through e) are self evident , and are not separately described.)

491. The following issues raised by AT&T and WorldCom were addressed separately by Qwest.

a) Qwest Comments on WorldCom Section 2—Regulatory Approvals[187]

492. Sections 2.1 and 2.2 of WorldCom's proposal are covered in substantially the same manner in Section 2 of the SGAT. WorldCom's proposed Section 2.3 would require that Qwest consult with and obtain WorldCom's consent to form and substance prior to filing any tariff and that such filings be consistent with the SGAT. Qwest has no legal obligation to obtain WorldCom's consent to conduct its business. Regarding WorldCom's Section 2.4, WorldCom can always request an amendment if it prefers terms contained in Commission orders or tariffs, and Section 2.2 of the SGAT proposes a process for doing just that.

[185] Qwest Rebuttal pg. 112
[186] Qwest Rebuttal pgs 113-115
[187] Qwest Rebuttal pg 113

b) Qwest Comments on WorldCom Section 16 — Waivers[188]

493. The concepts contained in WorldCom's proposed Sections 16.1 through 16.3 are covered by Section 5.13 (Default), and those contained in its Section 16.4 are covered by Section 2.2 of the SGAT. Qwest basically agrees with these concepts.

c) Qwest Comments on WorldCom Section 19 — Discrimination[189]

494. Qwest states that Standards for complying with the Act's nondiscrimination standards are addressed in the individual sections and WorldCom's proposal does not comply with the FCC's current nondiscriminatory standards. These provide that: (1) where there is a retail analog, the service shall be provided in substantially the same time and manner as Qwest provides the service to itself; and (2) where there is no retail analog, the service shall be provided in a manner that will allow an efficient competitor a meaningful opportunity to compete. *See, e.g., Verizon Massachusetts Order* at ¶ 11.

d) WorldCom Section 20.2 — Revenue Protection[190]

495. Qwest states that Section 11.34 of the SGAT already addresses revenue protection. WorldCom's proposal imposes additional unacceptable burdens on Qwest. Nonetheless, Qwest has negotiated an additional revenue protection provision with Sprint and would propose it in lieu of WorldCom's proposal. That provision reads as follows:

> (G)1.2 Revenue Protection - Qwest shall make available to Sprint all present and future fraud prevention or revenue protection features. These features include, but are not limited to, screening codes and call blocking. Qwest shall additionally provide partitioned access to fraud prevention, detection and control functionality within pertinent Operations Support Systems and signaling which include but are not limited to LIDB Fraud monitoring systems.
>
> (G)1.2.1 Uncollectible or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the party causing such error or malicious acts, if such malicious acts could have reasonably been avoided.
>
> (G)1.2.2 Uncollectible or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their subtending operational support systems by unauthorized third parties that could have reasonably been avoided shall be the responsibility of the party having administrative control of access to said Network Element or

[188] Qwest Rebuttal Pg 113
[189] Qwest Rebuttal pg 114
[190] Qwest Rebuttal pg 114

operational support system software.

(G)1.2.3 Qwest shall be responsible for any direct uncollectible or unbillable revenues resulting from the unauthorized physical attachment to loop facilities from the Main Distribution Frame up to and including the Network Interface Device, including clip-on fraud, if Qwest could have reasonably prevented such fraud.

(G)1.2.4 To the extent that incremental costs are directly attributable to a Sprint requested revenue protection capability, those costs will be borne by Sprint.

(G)1.2.5 To the extent that either Party is liable to any toll provider for fraud and to the extent that either Party could have reasonably prevented such fraud, the causing Party must indemnify the other for any fraud due to compromise of its network (e.g., clip-on, missing information digits, missing toll restriction, etc.).

e) WorldCom Section 25 — Branding[191]

496. The only branding required by the Act or the FCC rules is covered in Section 10.5.1.1.1 dealing with branding Directory Assistance and Section 10.7.2.10 dealing with branding of Operator Services. WorldCom's proposal goes far beyond anything required by the Act and should be rejected.

SGAT Section 4.24(a) (and other sections) – ICB

a) AT&T Position[192]

497. Qwest has proposed a definition for individual case basis or "ICB" but has not filed this language with its supplemental testimony.

> 4.24(a) Individual Case Basis – (ICB) – Each UNE or resale product marked as ICB will be handled individually on a pricing and/or interval commitment basis. Where ICB appears, CLEC should contact their account team for pricing, ordering, provisioning or maintenance information.

498. This definition is deficient. ICB provisioning is provided for in Qwest's SGAT in sections dealing primarily with collocation and UNEs. Assuming it is otherwise sufficient, Qwest's definition, however, applies only to "UNE or resale product[s]," not collocation or UNE products offered under the SGAT. In addition, Qwest's definition merely allows that the ICB process will address "pricing and/or

[191] Qwest Rebuttal pg 115
[192] AT&T Initial Comments pgs 4-6

interval commitment basis," ignoring that in certain contexts in the SGAT, the ICB process will be used to develop other kinds of terms and conditions.

499. CLECs who compete with Qwest have detailed in this docket the extraordinary resistance they have encountered with Qwest in trying to get performance of Qwest's Section 251 obligations. ICB just makes it that much easier for Qwest to hinder the activities of CLECs.

500. As an initial position, AT&T believes that Qwest should not be permitted to treat any service as ICB in the SGAT. Qwest should be required to establish specific and concrete terms for each service identified in the SGAT. If Qwest is allowed to have ICB treatment for certain services under this Agreement, Qwest must develop and propose a process that clearly outlines the steps and expeditious timeframes that are applicable to a CLEC's request under an ICB provision.

501. There also needs to be outside time (by which a CLEC may seek relief through arbitration or the Commission if Qwest has not provided acceptable terms to the CLEC).

b) WorldCom Comments[193]

502. WorldCom states that allowing Qwest to establish rates or provision services on an ICB gives Qwest unilateral control over ICB pricing and provisioning.

503. WorldCom views only two options if a CLEC does not agree to the ICB price proposed by Qwest: 1) pay the price and file a complaint at the Commission where it may have the burden of proving the ICB price to be unreasonable; or 2) not pursue unbundled packet switching from Qwest.

504. ICB pricing and provisioning process creates delay and uncertainty for CLECs. Qwest should not be permitted to set prices or provision services using ICB, except in very rare cases, and only where Qwest demonstrates it cannot provide a service as a standard offering. Qwest has failed to describe its ICB processes and has not justified why any particular service must be priced or provisioned on an ICB. If Qwest is permitted to use ICB pricing, WorldCom recommends that the process should include the following language:

> 1 As indicated by the acronym "ICB", which stands for "individual case basis", contained in Exhibit A of this Agreement addressing Rates, rates for some Network Elements or services ("ICB Rates") have not been approved by the Commission as of the Effective Date of this Agreement. With respect to all ICB Rates, prior to CLEC ordering any Network Element or service with an ICB Rate identified in Exhibit A to this Agreement, the Parties shall

[193] WorldCom Supplemental pgs 29-31

meet, at CLEC's request, to establish applicable interim rates.

2 During such meeting and upon CLEC request, Qwest shall provide CLEC, without limitation, with its TELRIC-based cost analysis and related supporting detail for the Network Element or service that CLEC wishes to order. Such cost analysis and supporting documentation shall be treated as confidential information if requested by Qwest under the non-disclosure sections of this Agreement.

3 If no agreement on a rate is reached within thirty (30) days of CLEC's request for a meeting, the Parties shall propose rates for the Network Element or service in question to the Commission in an appropriate proceeding. The Parties agree that they will jointly seek an expeditious resolution and final decision from the Commission in the proceeding in which the rates in question will be set. In the proceeding, Qwest shall have the burden of proving that its proposed prices are just and reasonable and compliant with TELRIC principles.

4 In the interim, prior to the issuance of a final Commission decision, Qwest shall provide the Network Element or service and shall set the price(s) for the Network Element or service based on its TELRIC.

5 Qwest shall track and record all quantities provisioned, durations, and amounts of payment for the Network Element or service ordered by CLEC.

6 If the Commission-determined price is lower than the price set by Qwest, Qwest shall refund to CLEC all payments in excess of the Commission established price, with simple interest at Qwest's weighted cost of capital within 30 days of the issuance of the final Commission decision.

7 If the Commission-determined price is higher than the price set by Qwest, CLEC shall be responsible for payment of the difference between the prices, with simple interest at Qwest's weighted cost of capital within 30 days of the issuance of the final Commission decision.

c) Qwest Position

505. Qwest's May 15, 2001 testimony references ICB's in a proposed for a revised SGAT Section 17.12. In its May 11, 2001 testimony, Qwest references the

various SGAT sections which provide for ICB pricing. It also points out that Arizona tariffs include many instances of ICB pricing and intervals. Finally, it points out that ICB has been present in state tariffs since 1980, and many CLECS have been buying products with ICB pricing and provisioning for several years.

Resolution

506. ICB pricing and intervals will continue as currently processed by Qwest.

II. DISPUTED ISSUES

DISPUTED ISSUE NO. 1 : Should the rates, terms and conditions for new products be substantially the same as the rates, terms and conditions for comparable products and services that are contained in the SGAT? (G-5, SGAT Section 1.7 and AT&T Proposed Section 1.7.2)

a. Summary of Qwest and CLEC Positions

507. CLECs propose that during the interim period between product rollout and before Commission approval, Qwest apply the rates, terms and conditions of its current products that most closely resembled the new product to the interim offering. AT&T offered language to the SGAT to this end:

> Proposed SGAT Section 1.7.2
>
> Qwest agrees that the rates, terms and conditions applicable to new products and services that are not contained in this SGAT shall be substantially the same as the rates, terms and conditions for comparable products and services that are contained in this SGAT. Qwest shall have the burden of demonstrating that new products and services are not comparable to products and services already contained in this SGAT.[195]

508. AT&T argues that Qwest suffers no disadvantage from this proposal.

509. Qwest's position is that proposed section 1.7.2 is unnecessary and unwarranted because the SGAT already contains sufficient safeguards against unreasonable rates, terms and conditions on new products and services and that the Commission will insure that any rates, terms and conditions are reasonable. Qwest points to SGAT Section 5.1.6 as affirmation that Qwest will offer products and services in accordance with laws and regulations. Qwest also points to Section 252(f)(2) of the Act requiring that SGAT rates comport with Section 252(d) addressing TELRIC and resale discount provisions. Qwest points to existing and ongoing regulation and oversight of its

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[195] *See also,* 8/21/01 CO Tr. at pp. 17-18; 7/9/01 WA Tr. at p. 3855.

rates by the Commission as further assurance that Qwest could not charge excessive amounts for new products.

510. Qwest further suggests that proposed section 1.7.2 promotes confusion and delay because of vague terms and an additional analysis layer required to resolve product disputes. Qwest argues that the focus of the proposed section is on comparable rates rather than what rates should be.

511. Finally, Qwest argues that it has the right to establish contractual rates, terms and conditions for its products and that nothing in the Act requires Qwest to offer a product or service to CLECs without first agreeing upon how Qwest will make it available and how CLECs will use and pay for it.

b. Discussion and Staff Recommendation

512. In its Proposed Findings of Fact and Conclusions of Law, Staff concurred with the CLECs that the present process for CLECs purchase of new products and services is lengthy and cumbersome, and an impediment to competition. While Staff sees some merit to the CLEC's proposal, it disagrees with its incorporation into the SGAT at this time (CLECs concept of comparability of rates, etc. with similar products, or that Qwest should accept the burden of proving non-comparability). Staff is not convinced that the CLEC's proposal would actually abbreviate the current process. Nonetheless, Staff agrees with the underlying premise of the CLEC's proposal that similar products or services should have comparable rates. Qwest is required to file with the Commission for approval any new rates, terms or conditions which it proposes to include in its SGAT. Staff's review will necessarily consider any rate anomalies with other similar rates and services, especially if these anomalies are brought to its attention by a competitor of Qwests. However, Staff's acceptance of Qwest's proposed language is conditioned upon a finding that Qwest's revised CICMP process does indeed, streamline the process for new products. Therefore, Staff's ultimate approval of Qwest's position requires a review of the revised CICMP, and a confirmation that it resolves CLEC concerns. For reference, Qwest Section 1.7.1 is shown below:

> 1.7.1 Notwithstanding the above, if the Commission orders, or Qwest chooses to offer and CLEC desires to purchase, new Interconnection services, access to additional Unbundled Network Elements, additional ancillary services or Telecommunications Services available for resale which are not contained in this SGAT or a Tariff, Qwest will notify CLEC of the availability of these new services through the product notification process through the CICMP. CLEC must first complete the relevant section(s) of the New Product Questionnaire to establish ordering and billing processes. In addition, the Parties shall amend this Agreement under one (1) of the following two (2) options:

1.7.1.1 If CLEC is prepared to accept Qwest's terms and conditions for such new product, CLEC shall execute a form Advice Adoption Letter (the form of which is attached hereto as Exhibit L), to be furnished by Qwest, and include as an attachment, the discreet terms and conditions available on Qwest's wholesale website, that Qwest has identified as pertaining to the new product. CLEC shall submit the Advice Adoption Letter to the Commission for its approval. CLEC shall also provide the Advice Adoption Letter to Qwest pursuant to the notice provisions in this Agreement and may begin ordering the new product pursuant to the terms of this Agreement as amended by such Advice Adoption Letter.

1.7.1.2 If CLEC wishes to negotiate an amendment with different terms and conditions than defined by Qwest for such new product, CLEC agrees to abide by those terms and conditions on an interim basis by executing the Interim Advice Adoption Letter (the form of which is attached hereto as Exhibit M) based upon the terms and conditions available on Qwest's wholesale website that Qwest has identified as pertaining to the new product. The Interim Advice Adoption Letter will terminate when the final amendment is approved. The rates, and to the extent practicable, other terms and conditions contained in the final amendment will relate back to the date the Interim Advice Adoption Letter was executed. No new product offering or accompanying Interim Advice Adoption Letter will be construed to limit or add to any rates, terms or conditions existing in this Agreement.

513. AT&T filed comments in response to Staff's Proposed Findings of Fact and Conclusions of Law. AT&T requested inclusion of a specific paragraph in the Conclusions of Law identifying the conditions recommended by Staff herein. Staff does not believe that the Conclusion of Law requested by AT&T is necessary. Nonetheless, after reviewing the Staff proposed language again, Staff recommends that additional language be included that indicates that the Qwest rates are interim and subject to true-up once the Commission reviews Qwest's rates and cost support and determines whether they are reasonable. Staff recommends that Qwest revise its SGAT and Interim Advice Adoption Letter for Arizona accordingly.

DISPUTED ISSUE NO. 2 : Should aggregated forecasts be treated as confidential? (G-8(B): SGAT Section 5.16.9)

a. Summary of Qwest and CLEC Positions

514. CLECs argue that Qwest has changed its position on forecast confidentiality and now offers a less restrictive policy that will misuse CLEC forecasts. In particular, CLECs take issue with the Qwest position that aggregate forecasts are not confidential. Further, that aggregation is the key to allowing Qwest employees other than those requiring the data to see the forecasts. CLECs argue that Qwest has not provided a list of employees who will have access to the forecasts and that Qwest's legal personnel should not have free access to aggregated CLEC forecast information to use in regulatory filings.

515. Qwest states that two other sections of the SGAT also deal with this issue regarding forecasts for LIS Trunks and for collocation. These are SGAT Sections 7.2.2.8.12 and 8.4.1.4.1 respectively. Qwest agrees to revisit the issue and addresses CLEC comments in two areas:

- Confidentiality of aggregated forecasts
- Limitation on employees seeing the forecasts

516. Regarding confidentially of aggregated forecasts, Qwest argues that data can only be considered confidential, proprietary, or competitively sensitive to individual CLECs if the data can be linked to the CLEC as opposed to aggregated data that does not lend itself to make that link. In situations where the aggregated data could be linked to an individual CLEC, Qwest has addressed this concern in the recent proposal for 5.16.9.1.1. In this section, Qwest would not disclose aggregated data "if such disclosure would, by its nature, reveal individual CLEC information."

517. Regarding language limiting access to the data, Qwest argues that "Qwest's Language Appropriately Limits Qwest Employee Access to CLEC Forecasts to those Employees Who Need to Know". SGAT language specifically prohibits the disclosure of CLEC forecasting information, in individual or aggregated form, to Qwest retail marketing, sales, or strategic planning personnel. There is also no argument that Qwest legal personnel should not have access to the forecasts. Qwest language defines the other personnel who could have access as "wholesale account managers, wholesale LIS and Collocation product managers, network and growth planning personnel responsible for preparing or responding to such forecasts or forecasting information."

518. Qwest concludes that the proposed section 5.16.9 appropriately balances the CLECs' and Qwest's interests and needs. Qwest further argues that they have incorporated a number of suggestions made by the CLECs in an effort to reach a compromise on this language.

b. Discussion and Staff Recommendation

519. Qwest contends that it should have the right to disclose aggregated CLEC forecast information. CLECs contend that forecast data are trade secrets and should not be disclosed to any party in any manner that could identify individual CLEC data. Only two types of data are currently forecast by CLECs, data for LIS Trunks and for collocation. These are addressed in separate SGAT Sections (7.2.2.8.12 and 8.4.1.4.1). In response to CLEC comments, Qwest has agreed to address anew in General Terms and Conditions (SGAT Section 5.16.9) the issue of how to treat CLEC forecasting information. Staff concurs with CLECs, that, except as required to disclose by law or regulation, Qwest shall not disclose aggregate CLEC forecast information, unless the CLECs consent to the disclosure.

520. In its Proposed Findings of Fact and Conclusions of Law, Staff found that the language proposed by Qwest was too broad. Staff therefore recommended adoption of the language proposed by the multi-state facilitator, with slight modification. The proposed language (SGAT Section 5.1.6.9.1.1) is as follows:

> Upon the specific order of the Commission, Qwest shall provide the forecast information that CLECs have made available to Qwest under this SGAT, under seal. Qwest shall take any actions necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures. Qwest shall provide notice to all CLECs involved at least 5 business days prior to the release of the information.

521. Staff also agreed with the multi-state facilitator that the language allowing access by Qwest legal personnel is more open ended than it needed to be. As recommended by the multi-state facilitator, Staff therefore recommended that Qwest should add the following language to SGAT Section 15.16.9.1:

> Qwest's legal personnel in connection with their representation of Qwest in any dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under this SGAT.

522. In its comments to Staff's Proposed Findings of Fact and Conclusions of Law, AT&T stated that as a point of clarification, the multistate facilitator's report stated that the language regarding legal personnel in para. 457 of Staff's Report should replace the language in SGAT Section 5.1.6.9.1 that reads "legal personnel, if a legal issue arises about the foreast." Staff clarifies, as requested by AT&T, that this is what is intended.

DISPUTED ISSUE NO. 3 : What is the appropriate scope of indemnification with the SGAT? (G-10, SGAT Section 5.9)

a. Summary of Qwest and CLEC Positions

523. CLECs argue that Qwest's proposed indemnity clauses are too narrow and the liability is too limited. They take exception with Qwest's assertion that indemnity provisions to CLECs should mirror its indemnity provisions for its mass-marketed services to end-users arguing that they have no application between carriers. AT&T offers competing language in Exhibit C of their brief.

524. Qwest's brief states that they have incorporated a number of changes to the indemnification process at the request of AT&T. The current indemnification provisions incorporate reasonable reciprocal indemnity rights and obligations.

525. Indemnification for bodily injury should be limited to failure to perform under the agreement. Qwest's proposed section 5.9.1.1, as limited by section 5.9.1.2, only applies to claims brought by persons or entities that are not end users of either party. It makes no sense to contractually obligate the parties to indemnify each other for any claim brought by any party relating to any conduct of the parties, even if unrelated to the agreement.

526. Each party should contractually indemnify the other for all claims brought by a party's end user. Qwest argues that in this situation, the Commission must ensure that the party in the best position to reasonably limit the potential liability does so. They argue that the current provisions enforce that behavior.

527. Finally, Qwest argues that the CLECs' concerns regarding "commission ordered retail service rules" are misplaced. CLECs raise a concern about being indemnified against any retail service quality payments, penalties, or commission fines they must pay as a result of provisioning or maintenance problems that they attribute to Qwest.[194] Qwest states that CLECs are not subject to these fines and that the PAP payments sufficiently compensate the CLECs for Qwest performance.

b. Discussion and Staff Recommendation

528. AT&T and WCom, in particular, propose that SGAT Section 5.9.1.1 be expanded to include indemnification for Acts or Omissions (vs. breach of contract) and to make Qwest liable for CLEC end-user customer retail service quality penalties. AT&T and WCom also propose other language revisions in favor of the own proposed limitation of liability language.

529. The issues raised generally involve the degree to which the provisions of the SGAT overlap the PAP; limitations on damages; limitations of liability; and indemnification language. The SGAT is a "standard" interconnection agreement. Rather

[194] *See* Ex. 6-Qwest-82 (Knowles WA Resp.) at 18.

than revisit all of the issues raised anew, Staff in its Proposed Findings of Fact and Conclusions of Law recommended that Qwest be required to utilize the limitation of liability, damages and indemnification provisions contained in its negotiated interconnection agreements with AT&T and WorldCom. Staff believed that these provisions were likely standardized and that considerable time was probably devoted to working out these provisions when the agreements were originally negotiated. Additionally, given that AT&T and WorldCom are two of the largest CLEC's nationwide and thus are highly sophisticated entities, Staff was confident that the provisions now contained in those interconnection agreements would be balanced and suitable for incorporation into the SGAT. Staff saw no need to reinvent the wheel in this proceeding. As to the issues raised regarding the interplay of the PAP and SGAT, Staff recommended deferring those issues to the discussion of the PAP.

530. In its Comments to Staff's Proposed Findings of Fact and Conclusions of Law, AT&T stated it had several issues with Staff's recommendations. AT&T Comments at p. 3. AT&T states first that Staff's recommendation should include the specific sections of the AT&T and WorldCom interconnection agreements that Staff recommends be included. Id. AT&T also notes that while some of the language in their current interconnection agreement was agreed upon, a portion of section 18 of the AT&T and WorldCom interconnection agreements was arbitrated. Id. AT&T also noted that Staff made no finding whether the language eliminated CLEC liability for end-user customer retail service quality penalties. Id. AT&T next objected to Staff's deferment of the issue regarding damages and the interplay of the SGAT and performance assurance plan ("PAP") to the discussion of the PAP, knowing full well that AT&T did not participate in the PAP discussions. AT&T Comments at p. 4. Further, AT&T argues that the issue is an SGAT issue, not a PAP issue, and needs to be resolved so that appropriate SGAT language is addressed and incorporated in the SGAT. Id. AT&T argues that CLECs cannot absorb losses and damages that should rightfully be Qwest's. Id. AT&T argues that Qwest should not be shielded from actual losses incurred by CLECs. Id. If so, AT&T notes that the PAP is nothing but a sham which would shift losses to CLECs under the guise of a backsliding provision required to obtain section 271 approval. Id. AT&T finally argues that Staff must address the issue regarding Qwest liability to CLECs because of the failure of Qwest to comply with retail service quality rules. Id.

531. Qwest also filed comments on Staff's initial recommendation on this issue. Qwest states that it incorporated a number of revisions to the indemnification provisions of the SGAT at the request of AT&T and in response to comments of the parties. Qwest Comments at pps. 2-3. Despite these revisions, Qwest states that the parties were unable to reach consensus on what the indemnity obligations should be with respect to claims made by third parties. Qwest Comments at p. 3. Qwest objects to Staff' recommendation to use the language from the existing AT&T and WorldCom agreements since no party advocated this position. Id. Qwest argues that Staff's recommendation is silent on the issue of whether the interconnection agreement indemnification language is to be incorporated verbatim, or whether it is to be tailored to accommodate other provisions of the SGAT upon which the parties have achieved consensus. Qwest Comments at p. 4. Qwest states that the language discussed by the parties throughout the workshop process and now proffered by the parties for inclusion in the SGAT represents

the most current views of the parties on the issue and should be evaluated on the merits. Id. Qwest states that its indemnity language that Qwest asks the Commission to adopt is reasonable, balanced and market-based. Id. Qwest states that it made further revisions to its language in response to the multi-state facilitator's recommendation and that it has agreed to incorporate those further revisions. Qwest Comments at pps. 4-5.

532. Qwest states that the first issue under Section 5.9 concerns AT&T's contention that Section 5.9.1.1 should not be limited to claims, including claims for bodily injury and damage to tangible property, made by third parties (other than end users of either party) resulting from breach of or failure to perform under the agreement. Qwest states that read in conjunction with Section 5.9.1.2 and prevailing industry practice, this provision equitably allocates exposure between the parties. Qwest Comments at pps. 5-6. Section 5.9 provides as follows:

> 5.9.1 The Parties agree that unless otherwise specifically set forth in this Agreement the following constitute the sole indemnification obligations between and among the Parties:
>
> 5.9.1.2 Each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an indemnitee) from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (including attorneys' fees), whether suffered, made, instituted, or asserted by any Person or entity, for invasion of privacy, bodily injury or death of any Person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, resulting from the Indemnifying Party's breach of or failure to perform under thus Agreement, regardless of the form of action, whether in contract, warranty, strict liability, or tort including (without limitation(negligence of any kind.
>
> 5.9.1.3 In the case of claims or loss alleged or incurred by an End User Customer of either Party arising out of or in connection with services provided to the End User Customer by the Party, the Party whose End User Customer alleged or incurred such claims or loss (the Indemnifying Party) shall defend and indemnify the other Party and each of its officers, directors, employees and agents (collectively the Indemnified Party) against any and all such claims or loss by the Indemnifying Party'', End User Customers regardless or whether the underlying service was provided or Unbundled Element was

> provisioned by the Indemnified Party, unless the loss was caused by the willful misconduct of the Indemnified Party.

533. Qwest's proposed Section 5.9.1.1, as limited by Section 5.9.1.2 only applies to claims brought by persons or entities that are not end users of either party. Id. at p. 6. As to such strangers to both parties, Qwest proposes that contractual indemnification rights would apply only if there is some nexus to the agreement between Qwest and the CLEC, i.e., a breach of or failure to perform under the agreement. Id. Qwest argues that it makes no sense to contractually obligate the parties to indemnify each other for any claim brought by any party relating to any conduct of the parties, even if unrelated to the agreement. Qwest Comments at p. 6. Qwest states that its proposal to limit the parties' indemnification obligations regarding claims brought by those other than end users of either party comports with established industry practice. Id. Qwest also states that in addition, although indemnification provisions between ILECs and CLECs in general contract offerings such as the SGAT do not have an exact analogue in the agreements or tariffs of carriers, CLECs routinely include indemnity language in their tariffs and agreements with end users that requires end users to indemnify the carrier for any claims brought by third parties relating to the use of the services provided by the carrier to the end user. Qwest Comments at p. 7. Qwest states that because there are literally thousands of scenarios under which one party could legally be obligated to indemnify the other at law, they should be contractually obligated to indemnify each other for claims of third parties other than end-users only where the underlying conduct bears some connection with the party's breach or failure to perform under the agreement. Id.

534. Qwest also argues that each party should contractually indemnify the other for all claims brought by a Party's end user. Without the end-user indemnification provision proposed by Qwest in Section 5.9.1.2, a CLEC may choose to offer such terms and then attempt to pass through any resulting liability for consequential or incidental (e.g., lost profits) damages to Qwest. Qwest argues that in effect the CLEC could foist upon Qwest unlimited liability relating to service outages. Qwest Comments at p. 8. If not limited, Qwest claims that AT&T could, as a marketing tool, offer to not exclude liability for consequential damages resulting from service outages, notwithstanding its own long practice to the contrary, on the assumption that under the contract, it will be able to shirt that liability to Qwest. Qwest Comments at p. 8. Qwest also states that its approach also incents each of the parties to maintain the longstanding contract and tariff-based limits that restrict customer damages resulting from performance-related breaches to direct damages and the cost of the services affected. Qwest Comments at pps. 8-9.

535. Qwest claims that the multi-state facilitator recommended the following language to be included at the end of Section 5.9.1.2:

> The obligation to indemnify with respect to claims of the Indemnifying Party's end users shall not extend to any claims for physical bodily injury or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have

> resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnified party.

Qwest argues that this language limits the obligation to indemnify against claims from end users and appropriately addresses the concern regarding a party's accountability for physical bodily injury or death and for property damage. Qwest Comments at p. 10. Qwest further claims that the Commissions of Nebraska, New Mexico and Montana have adopted the language Qwest proposes here. Id.

536. Upon reconsideration, Staff recommends adoption of Qwest's proposed language with the changes made by the multistate facilitator.

DISPUTED ISSUE NO. 4 : Bona Fide Request Process (BFR), Special Request Process (SRP) and Individual Contract Basis (ICB). A) Should Qwest provide notice of substantially similar BFRs? B) When should Qwest productize BFRs? C) Should Qwest expand the SRP beyond certain UNE and UNE-Cs? (G-11, Section 17.12 Exhibits F&I)

a. Summary of Qwest and CLEC Positions

537. CLECs take issue with relying on Qwest for whether a similar BFR has been granted or denied. The basic argument is the lack of information and clarity in the process. CLECs want Qwest to provide notice of similar BFRs to avoid the time for preparation of the BFR and payment.

538. CLECs also charge that Qwest has no process for determining when it should create a product offering of substantially similar BFRs or when and if it will ever submit its terms, conditions and prices for any given BFR to any Commission for approval.

539. The third general argument is that Qwest simply does not provide sufficient proof that it is not discriminating against CLECs in the use of its BFR process and its creation of products.

540. Qwest argues that in addition to substantial concessions in the BFR process, the BFR process must be kept in context in that it is developed for unique situations. Qwest points out that since 1999 they have received only two BFRs from the 114 CLECs doing business in Arizona.

541. Regarding the provision of notice, Qwest states that at least one other CLEC, however, has voiced the concern that requiring Qwest to make publicly available all BFRs to other CLECs raises important competitive issues.[196] Second, the CLECs

[196] *See id.* at 117-18 (New Edge indicating that it would *not* "want Qwest to release information on what New Edge is doing" to other CLECs); *see also id.* at 135-36; *see also* CO Tr. (8/21/01) at 80 (Brotherson) (noting, in this context, specific requests by CLECs to maintain confidentiality of such information).

acknowledge the proprietary nature of this information by qualifying their request for disclosure by their simultaneous request that certain information provided by CLECs in the BFR process remain undisclosed.[197] Qwest argues that the position being taken on notices conflicts directly with interconnection agreements of the CLECs.

542. The CLECs' demand that Qwest "productize" BFRs is unnecessary. Qwest has proposed making a given BFR a standard offering when, in the exercise of its sound discretion, it appears that a trend is beginning or it otherwise makes sense to make the BFR a standard offering. The CLEC's offer no definitive trigger for productizing.

543. Qwest states that AT&T's belated attempt to expand the scope of SRPs is inappropriate and that the issues were already considered and resolved in previous workshops.

544. Finally regarding the alleged discrimination because of a lack of a similar BFR process for retail customers, Qwest responds that there simply is no corresponding BFR-like process for retail services because Qwest does not sell interconnection and UNEs to retail customers.

b. Discussion and Staff Recommendation

545. Qwest states that it has substantially modified the SGAT to narrow the issues in the spirit of compromise; and agrees that the three issues listed above are all that remain.

546. Qwest provides notice to an individual CLEC within several days (although Qwest does not identify with specificity the actual timing) if a BFR submitted is similar to a previous BFR submitted by the same CLEC (SGAT 17.12). Qwest's position regarding notification to all CLECs when a substantially similar BFR has been processed, is that such requests are confidential and proprietary, so general notice is inappropriate. Indeed, Qwest cites cases in which CLECs have requested confidentiality. Further, Qwest argues that there could be conflicts among different CLEC Interconnection Agreements (ICAs) as compared to the more general terms of the SGAT, which allow Qwest to provide such information without revealing CLEC identification. In its Proposed Findings of Fact and Conclusions of Law, Staff agreed with the approach taken by the multi-state facilitator on this issue, whose Report states in relevant part:

> "It makes for bad policy to require CLECs to bear the burden of asking Qwest continuously whether technical barriers precluding an important form of access have come down. It is also not appropriate to make CLECs ask informally what progress may have been made on certain offerings before they expend the time and expense to prepare a BFR. It is far better to require Qwest to inform

[197] *See* CO Tr. (8/21/01) at 69-71.

CLECs generally, because Qwest will know as soon as any material change takes place.

CLECs should be required to take the risk that others will learn something about portions of their business that rely upon the same rights of access to Qwest network that others have, when such knowledge comes through information about network access Qwest makes available through the BFR process. When balancing the risks of this exposure against the need for assuring nondiscriminatory treatment of CLECs, the outcome is clear. CLECs should have prompt notice from Qwest when important technical feasibility barriers have been overcome.

If there is confidential information in the CLEC request, it can be protected adequately. What other CLECs need to see is not the request, but the particular form of access to Qwest's network that Qwest will provide as a result of the request. ....Apart from the protection given through denying access to the request itself, CLECs will be on notice of this rule, and therefore should be expected to be judicious in what they provide to Qwest in their requests."

547. Staff supported inclusion in the SGAT of the same language proposed by the multi-state facilitator:

Qwest shall make available a topical list of BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow a CLEC to understand the general nature of the product, service or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also be required upon the request of a CLEC to provide sufficient details about the terms and conditions of any granted requests to allow a CLEC to elect to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or service available under this SGAT. A CLEC shall be entitled to the same offering terms and conditions made under any granted BFR provided that Qwest may require the use of ICB pricing where it makes a demonstration to the CLEC of the need therefore.

548. CLECs contend that if a product were technically feasible within Qwest's network, a technically feasible type of interconnection has been created and should be made available to all CLECs on a standardized basis, and to do so, Qwest should create a product and provide product-like cost support. Qwest agrees that there are times when a BFR should be productized, but disagrees with the notion of an arbitrary or predetermined number of BFRs, preferring to rely on judgment based on experience. Staff suggests that Qwest, with CLEC input, develop a series of criteria that would accelerate the productization of BFRs and that this process should be incorporated within the CICMP and subsequently by provisions within the SGAT. Staff, therefore, concludes that this issue should be resolved in favor of the CLECs.

549. CLECs argue that the SRP should be expanded to include interconnection, collocation and all other obligations that Qwest must meet, if a standard product has not been provided. Essentially, this issue relates to Section of SGAT Exhibit F which h appears to limit the services CLECs may request through the SRP to certain UNE combinations. Qwest states that it is inappropriate to expand the scope of the SRP process within the framework of GT&C. In its Proposed Findings of Fact and Conclusions of Law, Staff agreed with both the multi-state facilitator and the Washington Hearing Officer on this issue that there was nothing unique about UNEs that makes them any more or less amenable to SRP resolution than are other non-standard elements or services, such as stand-alone UNEs, for example. Therefore, consistent with the Washington Hearing Officer's recommendation, Staff recommended that Qwest should be required to modify Exhibit F of the SGAT to allow CLECs to use the SRP process for all services and products for which Qwest has no product offering, and for which there is no need to test for technical feasibility.

550. AT&T requested clarification in its Proposed Findings of Fact and Conclusions of Law that it was Staff's position that Qwest should be required to develop a series of criteria that would accelerate the productization of BFRs. AT&T Comments at p. 4. To the extent it was not clear in its original report, Staff clarifies that it is recommending, in part, that Qwest be required to develop a series of criteria, and include them in its SGAT, to accelerate the productization of BFRs.

DISPUTED ISSUE NO. 5 : Should SGAT provisions expire upon expiration of terms for SGAT or other interconnection agreements if provisions are selected through the "pick and choose" process for incorporation into new or existing interconnection agreements? (G-22, SGAT Section 1.8)

a. Summary of Qwest and CLEC Positions

551. Qwest must not act in a manner that unreasonably delays CLECs from obtaining "any" individual interconnection, service or element contained in "any" Qwest agreement approved by the State. Thus, when Qwest desires that the CLEC adopt terms in addition to those sought by the CLEC, Qwest must prove to the Commission that such terms are "legitimately related."

552. The particular provisions chosen by the CLEC should at least be made available under the same rates, terms, and conditions as those provided in the agreement. As to what constitutes a reasonable time, (a) the original agreement must be available for picking and choosing for a period equal to the duration of the contract (e.g., two year term equals a two year availability for other CLECs); and (b) all subsequent arrangements adopted in previous agreements must be available for pick and choose for nine months.

553. AT&T outlines what it terms Qwest's conduct that is contrary to the law. The conduct sited includes; applying terms different than those in the original agreements, exaggerating and abusing the "legitimately related" requirement[198] and failing to allow lawful requests to opt into Commission-approved agreements.

554. Qwest argues that their "Pick and Choose" proposals are reasonable. Further, over one year ago, the pick and choose language was specifically negotiated between AT&T and Qwest, accepted by all parties to all states, and specifically approved by all 12 state commissions with active 271 dockets.

555. Regarding the anecdotal evidence discussed by AT&T, Qwest states that its witness Mr. Brotherson in fact rebutted these issues in the workshops.

b. Discussion and Staff Recommendation

556. Termination Date: AT&T argues that "pick and choose" provisions should inherit the expiration dates of the agreements to which they are being imported rather than the agreements from which they are taken. Qwest's position is that the "pick and choose" language was negotiated between AT&T and Qwest, accepted by all parties and approved by all state commissions with active 271 dockets. Both Qwest and AT&T base their positions on 47 CFR 51.809(c). In its Proposed Findings of Fact and Conclusions of Law, Staff recommended that AT&T's position be adopted absent more compelling arguments by Qwest as to why the termination date from the original agreement should be used. Use of the original termination date might discourage CLECs from using the "pick and choose" provision afforded to them under federal law. For instance, if a CLEC chose provisions from multiple agreements, its agreement would contain an amalgamation of different termination dates. This would appear to result in an overly burdensome process, for which the CLEC and Qwest would be forced to continually negotiate language on a provision by provision basis as the various provisions expired. This would create nothing short of an administrative quagmire for CLEC and Qwest alike. Additionally, the FCC has provided the solution already in that Qwest may offer terms and conditions different from the original CLEC if it can show that the particular contract has been available for an unreasonable amount of time after its approval, and new terms and conditions would apply.

[198] AT&T objects to Qwest's attempt to re-define its obligation regarding "legitimately related" using its SGAT definitions section. Filed simultaneously herewith, AT&T is offering the definitions language that AT&T and Qwest have agreed to; the only dispute with respect to these definitions is the definition of "legitimately related."

557. Qwest's position regarding identification of provisions "legitimately related to other provisions" that a CLEC seeks to adopt is that it complies with Section 252(i) of the Act. Qwest has offered to add additional SGAT language to both Sections 1.8.2 and 4.0 to address the CLECs concerns:

> 1.8.2 In addition, Qwest shall provide to CLEC in writing an explanation of why Qwest considers the provisions legitimately related including legal, technical or other considerations.
>
> 4.0 "Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those that specifically relate to other interconnection, services or elements in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties to that particular interconnection, service or element. The terms and conditions would not include General Terms and Conditions to the extent that the LEC Interconnection agreement already contains the requisite General Terms and Conditions.

558. In addition, SGAT Section 1.8.1 places on Qwest the burden of demonstrating that any provision it seeks to include is "legitimately related" to the element, service or interconnection requested. These provisions appear to sufficiently limit Qwest's ability to include unrelated terms and conditions. In its Proposed Findings of Fact and Conclusions of Law, Staff recommended that Qwest be required to revise its SGAT as set forth above.

559. In its Comments to Staff's Proposed Findings of Fact and Conclusions of Law, Qwest stated that the issue presented is whether "pick and choose" provisions that are taken from existing agreements and imported into new interconnection agreements should have the expiration date of the original agreements from which they are taken. Qwest Comments at p. 11. Qwest's states that, contrary to Staff's finding, it should not. Id. Qwest states that its position is supported by the clear majority of authority, including the FCC and every commission to consider the impasse issue to date. Id. Qwest claims that this authority plainly holds that provisions taken from existing interconnection agreements pursuant to "pick and choose" rights have an expiration date that is coterminous with the expiration date of the original agreement. Id. Otherwise, Qwest claims that CLECs would be able to extend "pick and choose" provisions indefinitely. Id. Qwest also relied upon the multi-state facilitator's finding that a circular "pick and choose' scheme could extend a provision indefinitely and, as the Facilitator stated, leave "Qwest sort of picked and choosed forever." Id.

560. Qwest further claims that perpetual pick and choose provisions should be avoided because perpetual provisions like those proposed by AT&T and endorsed by the Staff's Proposed Findings, would deprive Qwest of the ability to appropriately respond to evolving and changing market conditions. Id. Qwest also argues that such an approach deprives Qwest of incentives to enter into innovative provisions for fear that if these provisions turn out differently than expected, Qwest would be subject to the contract provisions in perpetuity. Id. Finally, Qwest relies upon *In re Global NAPs, Inc.*,[199] and states that the FCC stated that any language taken from an existing agreement must keep the expiration date of the original agreement.

561. Upon reconsideration, having reviewed footnote 25 of the *Global NAPs* decision relied upon by Qwest, Staff agrees with Qwest that the FCC appears to have interpreted Section 252(i) in such a fashion as to require the opting-in company to take the termination date of the original agreement. The FCC stated in relevant part: "In such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date." Therefore, Staff recommends adoption of Qwest's position on the first issue raised.

DISPUTED ISSUE NO. 6 : Should Qwest's tariffs on changes in regulation automatically amend the SGAT? (G-23, SGAT Section 2.1)

a. Summary of Qwest and CLEC Positions

562. AT&T's perspective is that, there exists in the SGAT already, limited sections that describe how Qwest retail tariffs may alter the SGAT and to what extent it is altered.[200] Nothing more is needed in this regard to protect Qwest's interests. Qwest's request to obtain an overarching tariff-revision provision violates the fundamental requirements of the U.S. Constitutional right to contract and the carrier's right to rely on promises made.[201] AT&T also states that several Commissions have already approved interconnection agreements that bar Qwest from attempting to alter interconnection agreements through changes in its tariff filings and nothing presented during these workshops should change this position. [202]

563. WorldCom states that for the SGAT to have meaningful commercial purpose, the CLEC must be able to rely on its terms and conditions and know that the terms cannot be unilaterally changed by Qwest through tariff filings and internal Qwest memoranda.[203] This is an essential premise of a contractual relationship and why

[199] *In re Global NAPs, Inc.*, CC Docket No. 99-154, FCC 99-199 (rel. Aug. 3, 1999).
[200] *See e.g.*, SGAT §§ 6.2.2.7, 6.2.4, 6.2.13, 6.2.14, 6.3.1, 6.3.3, 6.3.6, 6.3.9, 6.3.10, and 6.5.1; *see also,* SGAT § 7.2.1.1.
[201] *See* cites to the U.S. Constitutional ex post facto and contract rights and discussion in the section that follows.
[202] *See* AT&T ICAs with Qwest in: Idaho, Part A § 53; Iowa, Part A, § 20; Nebraska, Part A, § 20; and Utah, Part A, § 53.
[203] See, Supplemental Testimony of Michael W. Schneider, Arizona Exhibit 6 WorldCom-2, at 6-11, wherein Mr. Schneider details the reasons for eliminating Qwest's proposal to incorporate other documents

Congress chose interconnection agreements rather than tariffs as the basis for the ILEC/CLEC relationship under the Act. The filing of a tariff to supercede the SGAT is fundamentally at odds with the requirement that the parties "negotiate the particular terms and conditions of agreements" to fulfill the duties described in the Act.

564. Qwest states that their Section 2.1 does not supplant the change of law provisions and only serves to incorporate the parties' reasonable intent to reference current as opposed to superseded legal or technical authorities. To the extent that a new or updated authority is published which substantively affects the parties' relationship, section 2.2 of the SGAT will be invoked and apply. The SGAT should be accorded the same legally binding effect as any other contract, and any effort to expand the parties' rights or obligations beyond the express written agreement should be rejected.

b. Discussion and Staff Recommendation

565. CLECs contend that Qwest can make a unilateral change to a tariff that would, through changes to the SGAT, amend the Interconnection Agreements unilaterally. Qwest argues that any tariff change requires Commission approval. Qwest proposed a revised version of SGAT Section 2.1 to make clear that references in the SGAT to statutes, rules, regulations, tariffs, technical publications and other related documents are the most recent versions of those documents. WorldCom suggested an abbreviated version of Qwest's proposed SGAT Section 2.1. The revised Qwest wording is shown below.

> 2.1 This Agreement includes this Agreement and all Exhibits appended hereto, each of which is hereby incorporated by reference in this Agreement and made a part hereof. All references to Sections and Exhibits shall be deemed to be references to Sections of, and Exhibits to, this Agreement unless the context shall otherwise require. The headings and numbering of Sections and Exhibits used in this Agreement are for convenience only and will not be construed to define or limit any of the terms in this Agreement or affect the meaning and interpretation of this Agreement. Unless the context shall otherwise require, any reference to any statute, regulation, rule, Tariff, technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards, shall be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) of that statute, regulation, rule, Tariff, technical reference, technical

that may be subject the Qwest's unilateral control. In that testimony, Mr. Schneider also presents evidence where Qwest has unilaterally changed procedures in a manner contrary to interconnection agreements in the past.

> publication, or any publication of telecommunications industry administrative or technical standards that is in effect. Provided however, that nothing in this Section 2.1 shall be deemed or considered to limit or amend the provisions of Section 2.2. In the event a change in a law, rule, regulation or interpretation thereof would materially change this Agreement, the terms of Section 2.2 shall prevail over the terms of this Section 2.1. In the case of any material change, any reference in this Agreement to such law, rule, regulation or interpretation thereof will be to such law, rule, regulation or interpretation thereof in effect immediately prior to such change until the processes set forth in Section 2.2 are implemented. The existing configuration of either Party's network may not be in compliance with the latest release of technical references, technical publications, or publications of telecommunications industry administrative or technical standards.

566. In its Proposed Findings of Fact and Conclusions of Law, Staff, however, stated that Qwest's proposed version of SGAT Section 2.1 is more explicit, should minimize possible misinterpretations and should be adopted, with slight modification. See also Issue No. G-24 (SGAT Section 2.2) and Issue No. G-25 (SGAT Section No. 2.3). First, Staff did not believe that Qwest should be allowed to alter the terms and conditions of interconnection agreements through unilateral tariff filings it may make. Thus, Staff recommended that the term "tariffs" be stricken from Qwest's proposed language. Staff also recommended that Qwest be required to give all CLECs notice, on its web-site, of all new tariff filings and the date filed. Changes to tariffs should be applied on a prospective basis and should not operate to change the terms and conditions of any existing interconnection agreements. In addition, Staff recommended that Qwest publish on its web-site any new statutes, rules, technical references, technical administrative or technical standards and any other applicable technical publications which it intends to invoke or use on a going forward basis pursuant to Section 2.1 of the SGAT which would represent a change in Qwest's current policy or relationship with CLECs. Staff finally recommended that Qwest be required to revise its SGAT to incorporate these additional requirements.

567. In its comments to Staff's Proposed Findings of Fact and Conclusions of Law, Qwest stated that its language for SGAT Section 2.1 is standard contract language that provides that any references to statutes, regulations, rules, tariffs or technical publications and other such documentation shall be deemed to be a reference to the most current version or edition of the authority or documentation referenced. Qwest Comments at p. 13. Qwest further stated that by way of Section 2.1, Qwest sought to avoid any confusion about which version or edition of a referenced document the parties should be working with when implementing this SGAT as their interconnection

agreement over the course of the term of the agreement. Qwest states that Staff's two modifications are unnecessary.

568. With respect to the Staff recommendation to strike "tariffs," Qwest claims that Staff's concern is already resolved by Qwest's proposed language, which provides that Section 2.2 (the change of law provision of the agreement) governs any material changes in the law, rules, regulations or their interpretation. Qwest Comments at p. 14. Qwest states that with respect to changes in tariffs, technical publications and other documents referenced in the SGAT, Section 2.3 specifies that in cases of conflict, the rates, terms and conditions of the SGAT shall prevail. Qwest Comments at pps. 14-15. Further, according to Qwest, Section 2.3 addresses the situation where a new version of a document may not conflict with the SGAT but may abridge or expand the rights or obligations of either party. In that situation, Qwest states that Section 2.3 provides that the rates, terms and conditions of the agreement shall control:

569. With respect to Staff's second recommendation that Qwest provide notice of its tariff filings on its web site, Qwest states that it already provides such notice, and that it is unnecessary to include this requirement in the SGAT. Qwest Comments at p. 16. Qwest also states that Staff's recommendation regarding the publication on Qwest's web site of essentially any updated version of any documentation that might be encompassed by Section 2.1's straightforward reference to current versions is unduly burdensome and unwarranted. Id.

570. First, Staff will reconsider its recommendation that Qwest delete the reference to "tariffs" in Section 2.1 of its SGAT. Staff recommends that Qwest be allowed to retain such language as long as its indicates in the future, if and to what extent any revised or new tariff has an impact on the SGAT or its other agreements with competitors. Qwest should be required to include such an impact statement with any tariff filing it makes in the future. Qwest should be required to modify its SGAT to include this requirement. Notwithstanding, in the case of a conflict, the rates, terms and conditions of the SGAT or CLECs existing interconnection agreement shall prevail, as set forth in SGAT Section 2.3. Second, while Qwest objects to publishing changes in technical publications, etc., on its web site, that would affect CLEC's rights under their interconnection agreements, Staff believes that its recommendation to publish changes in technical publications, etc., on its web site is required of Qwest in its CMP process anyway.

DISPUTED ISSUE NO. 7 : What is the appropriate process for updating the agreement when there is a change in law? (G-24, SGAT Section 2.2)

a. Summary of Qwest and CLEC Positions

571. AT&T states that Qwest wants to be bound by what it considers the "current" interpretations of the Act and state law as soon as such pronouncements can be considered final adjudications regardless of the pre-existing agreements.[204] Further, that

[204] SGAT §§ 2.1 & 2.2; 6/1/01 AZ Tr. at p. 550; 8/21/01 CO Tr. at pp. 178-179; 7/9/01 WA Tr. at p. 3917.

while parties to a contract may generally modify such contract by mutual agreement,[205] Qwest takes it a step further. Qwest asks that the Commission provide Qwest with the right to force upon the CLECs an immediate change to contracts for "immaterial" changes and very a abbreviated opportunity to modify agreements to accommodate "material" changes in law.[206] Furthermore, Qwest creates a resource draining and impractical double arbitration process by making the parties arbitrate interim agreements pending the outcome of the primary arbitration.[207]

572. AT&T proposes that the parties perform under the agreement or SGAT until such time as the parties have either mutually agreed upon a change or until any disputes associated with differing views of the change in law are resolved. The ability to rely upon the current contract is held at *status quo* until the modification is worked out. This proposal is consistent with both state law and the U.S. Constitutional requirements related to contracts and ex post facto laws.

573. WorldCom proposes specific language that defines timeframes and conditions for updating agreements. This language proposed for 2.2. reads:

> 2.2 The provisions in this Agreement are intended to be in compliance with and based on the existing state of the law, rules, regulations and interpretations thereof, including but not limited to state rules, regulations, and laws, as of the date hereof (the "Existing Rules"). Nothing in this Agreement shall be deemed an admission by Qwest or CLEC concerning the interpretation or effect of the Existing Rules or an admission by Qwest or CLEC that the Existing Rules should not be changed, vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, vacated, stayed or modified. To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days after notification from a Party seeking an amendment due to a modification or change of the Existing Rules of if any time during such sixty (60) day period the Parties shall have ceased to negotiate new terms for a continuous period of

[205] *Yeazell v. Copins,* 402 P.2d 541, 545 (Ariz. 1965)(contracts may not be unilaterally modified); *Ruck Const. Co. v. Tucson,* 570 P.2d 220, 222 (Ariz. 1980)(one party cannot alter contract terms without consent from the other party).
[206] 6/1/01 AZ Tr. at p. 552-555; 8/21/01 CO Tr. at pp. 194-195; 7/9/01 WA Tr. at p. 3919.
[207] SGAT §§ 2.2 & 2.3.1.

> fifteen (15) days, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be amended as set forth in Section 2.2, to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. Any amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. During the pendency of any negotiation for an amendment pursuant to Section 2.2, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement.

574. Qwest again argues that they have already made significant concessions to the CLECs. These include to agreeing to add in the definition of Existing Rules, "state rules, regulations, and laws" and to add language indicating that the SGAT is not only "based on" but also "in compliance with" Existing Rules. Section 2.2 is directly responsive to issues raised by the CLECs and strikes an appropriate balance between the CLECs' desire for contractual certainty and Qwest's obligation to comply with relevant rulings of state and federal authorities in a timely manner. Qwest's proposed language is entirely reciprocal. Although not so stated, Qwest's proposal basically aligns with the proposed WorldCom wording in terms of timing.

b. Discussion and Staff Recommendation

575. The process for updating the SGAT to accommodate "changes in law" is provided in SGAT Section 2.2. Qwest argues that it has significantly revised Section 2.2 to be responsive to CLEC issues. Qwest's proposal includes establishment of an interim operating agreement, 60 days for negotiation followed by application of the dispute resolution process, if necessary.

576. In its Proposed Findings of Fact and Conclusions of Law, Staff concurred with the CLECs that an interim operating agreement is unnecessary, since the existing operating agreement could be followed during the 60-day negotiating period. WorldCom's proposed wording for SGAT Section 2.2 clearly describes the range of related matters with which all parties, including Qwest, have agreed, and should be adopted.

577. In its Comments on Staff's Proposed Findings of Fact and Conclusions of Law, Qwest states that while it continues to believe in the merits of an interim operating agreement, Qwest agrees to implement Staff's proposal to exclude from Section 2.2 the provision for an interim operating agreement to govern the parties during the dispute resolution process. Qwest Comments at p. 17. Qwest argues, however, that with this issue gone, the Commission should adopt the remainder of Qwest's proposed language rather than WorldCom's for SGAT Section 2.2. Id. Qwest argues that reconciling the

language differences in favor of Qwest's Section 2.2 will conform the language to that used in SGATs in other states and avoid potential confusion about differences. Qwest's Section 2.2 language is as follows:

> 2.2 The provisions in this Agreement are intended to be in compliance with and based on the existing state of the law, rules, regulations and interpretations thereof, including but not limited to state rules, regulations, and laws, as of the date hereof (the Existing Rules). Nothing in this Agreement shall be deemed an admission by Qwest or CLEC that the Existing Rules should not be changed, vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, vacated, dismissed, stayed or modified. To the extent that the Existing Rules are vacated, dismissed, stayed or materially changed or modified, then this Agreement shall be amended to reflect such legally binding modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days after notification from a Party seeking amendment due to a modification or change of the Existing Rules or if any time during such sixty (60) Day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected, or if requested by CLEC, amended as set forth in Section 2.2, to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. Any amendment shall be deemed effective on the Effective Date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. During the pendency of any negotiation for an amendment pursuant to this Section 2.2, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement. For purposes of this section, "legally binding'

means that the legal ruling has not been stayed, no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation, has passed.

578. Upon reconsideration, for consistency purposes, Staff believes that Qwest's language with the modifications made by Staff in its Proposed Findings of Fact and Conclusions of Law is satisfactory. With the interim operating agreement provisions deleted, Staff believes that the language proposed by WorldCom and Qwest is very similar. Staff would make only two modifications to Qwest's language. First, Staff recommends deletion of Qwest's definition of "legally binding," or in the alternative, that it refer only to a stay having not been granted. Second, Staff does not believe that any party should give up its right to bring disputes before the appropriate regulatory body, in the first instance. Qwest dispute resolution language should be modified to include a party's right to go to the appropriate regulatory body for resolution in the first instance if it so desires, if these provisions do not contain this right already.

DISPUTED ISSUE NO. 8 : How should conflicts between the SGAT and other Qwest documents and tariffs be treated? (G-25, SGAT Section 2.3)

a. Summary of Qwest and CLEC Positions

579. AT&T combined this issue with 2.1 which has been discussed above.

580. WorldCom proposes that certain Qwest language be stricken from Section 2.3 of the SGAT. The Dispute Resolution Process found in Section 5.18 states the rights and obligations of the parties during the process. Setting it out in Section 2.3 as well injects confusion into the SGAT to the extent that its terms conflict in any way with that general section of the SGAT. WorldCom continues to discuss specific language modifications.

581. Qwest has modified Section 2.3 as an attempt to satisfy CLEC comments. Qwest states that the language as amended is acceptable. If the Commission specifically determines that an order prevails over the SGAT, that order will prevail. Otherwise, the SGAT prevails. The language proposed by Qwest clearly articulates this position and insures that the parties will give Commission decisions their proper effect. Qwest's language properly addresses the parties' obligations while a dispute is pending. Qwest's language properly describes variances between the SGAT and other relevant documents.

b. Discussion and Staff Recommendation

582. It was agreed by the parties participating in the Arizona Workshops that the SGAT is the prevailing document, should conflicts arise. This is memorialized in SGAT Section 2.3. In response to CLEC comments and concerns, Qwest has proposed additional language in Sections 2.3 and 2.3.1. The proposed language reiterates SGAT precedence over other conflicting documents, and proposes a dispute resolution process. In its Proposed Findings of Fact and Conclusions of Law, Staff concurred with the

proposed SGAT Sections 2.3 and 2.3.1, with the exception of the implementation of an interim operating agreement (See also Impasse Issue G-24). Rather Staff recommended that parties continue to operate under existing agreements throughout the dispute resolution process. Staff suggested adoption of Qwest's proposed SGAT Section 2.3 and the first three sentences of Section 2.3.1. Staff recommended that the last two sentences of SGAT Section 2.3.1 should be deleted, and replaced with language, which reflected continued operations under existing agreements. The language is as follows:

> 2.3 Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT, then the rates, terms and conditions of this SGAT shall prevail. To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail.
>
> 2.3.1 If either Party believes, in good faith, that a change in Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT abridges or expands its rights or obligations under this SGAT and that change has not gone through CICMP, the Parties will resolve the matter under the Dispute Resolution process. Any amendment to this Agreement that may result from such Dispute Resolution process shall be deemed effective on the effective date of the change for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. During the pendency of the Dispute Resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, for up to sixty (60) days.

583. In its Comments to Staff's Proposed Findings of Fact and Conclusions of Law, AT&T states that Staff adopted Qwest's proposed SGAT section 2.3 and the first 3 sentences of section 2.3.1. AT&T recommends that in section 2.3.1, the phrase "and the change has not gone through CICMP" be deleted. AT&T Comments at p. 5. AT&T argues that this language implies that changes that have gone through CICMP have been agreed to by the parties which is not always the case. Id. AT&T states that the language would suggest that, since the change went through CMP, the CLECs would not have the right to take the issue to dispute resolution and the change would flow through to the SGAT. Id.

584. In its Comments to Staff's Proposed Findings of Fact and Conclusions of Law, WorldCom requests that the sentence contained in section 2.3.1: "During the pendency of the Dispute Resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, for up to sixty (60) days. WorldCom Comments at p. 3. WorldCom states that this sentence was not included in the Colorado SGAT. Id. In the alternative, WorldCom recommends that the last sentence be modified to state: "During the pendency of the Dispute Resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement" with no reference to any time period, such as the 60-day period Staff proposes. WorldCom Comments at p. 4.

585. Upon reconsideration, Staff believes that WorldCom proposed language change is reasonable and should be made. Staff's original language limiting continued effectiveness during a sixty-day negotiation period was actually an error. Staff, therefore, recommends that the last sentence of Staff's proposed Section 2.3.1 be modified to read as follows: "During the pendency of the Dispute Resolution the parities shall continue to perform their obligations in accordance with the terms and conditions of this agreement." Staff also agrees with the change requested by AT&T. Staff recommends deletion of the following language currently contained in SGAT Section 2.3.1: ". . . and the change has not gone through CICMP . . ." As AT&T notes, not all CLECs may agree in the CICMP process with a particular modification, and the CLEC should not lose its right under its interconnection agreement to challenge any change to its current agreement.

DISPUTED ISSUE NO. 9 : Should liability for losses related to performance under the Agreement be limited to the total charges billed to CLEC during the contract year, except for willful misconduct? (G-35, SGAT Section 5.8)

a. Summary of Qwest and CLEC Positions

586. AT&T states Qwest's position, as revealed by SGAT § 5.8.1 *et seq.*, is that generally it should not be liable for anything other than the cost of the service the CLEC paid or would have paid to Qwest in the year in which the nonperformance arose.[208] All incentives to perform under the terms of the agreement, SGAT and Act are lost in relation to Qwest's interactions with that CLEC (and in fact with all CLECs). By and large, the proposed limitations protect Qwest, not CLECs, even though the provisions are reciprocal. If Qwest can simply not perform and not face any real liability for its breach, there exists a failure to create the contract required under the Act. AT&T offers alternative language to address it's concerns.

587. WorldCom states that the Qwest language is too restrictive as it improperly absolves Qwest of liability for egregious, grossly negligent acts and repeated breaches of the material obligations of the Agreement. To avoid this problem and

[208] *See generally* SGAT §§ 5.8.1, 5.8.2 and 5.8.4 (excluding willful misconduct from the limitation) for greater detail on the further limitation of the costs that Qwest will repay.

provide CLECs with adequate protection from potential improper conduct of Qwest, the Commission should replace "willful misconduct" with "gross negligence, willful misconduct and repeated breaches of material obligations of the Agreement." WorldCom also concurs with AT&T's arguments as to required changes to Section 5.8.

588. Qwest views the remaining items in dispute as relating to limitations on liability stemming from a fundamental disagreement between Qwest and AT&T about the proper scope and purpose of the limitation section. Qwest views the purposes of this section as straightforward. Section 5.8 aims at limiting the parties' potential liability to each other and to third parties in a way that is both consistent with established industry practice and comports with existing state law.[209] Qwest's proposal to limit liability for performance-related losses to the cost of service is reasonable and supported by extensive industry practice. Further, the CLECs' comments relating to payments made pursuant to a performance assurance plan are misplaced.

589. Qwest's reluctance to expand the "willful misconduct" exclusion is well supported and should be adopted. Qwest included the term "willful misconduct" in its proposed exception in section 5.8.4 because that is the standard exclusion contained in the telecommunications tariffs, including those of both Qwest and AT&T.[210] AT&T's proposed modifications to section 5.8.6 are an attempt to deviate from the industry practice of excluding willful misconduct from liability limits and should be rejected.

b. Discussion and Staff Recommendation

590. Qwest argues that limits on liability associated with performing a service or function under contract should be limited to the price of the service or function, which Qwest states is a standard practice in the telecommunications industry. Qwest excepts "willful misconduct" from liability limitations. CLECs recommend excepting from liability limitations: gross negligence and repeated breaches of material obligations of the Agreement.

591. In its Proposed Findings of Fact and Conclusions of Law, consistent with its earlier recommendation, Staff recommends that Qwest utilize the language now contained in the AT&T and WorldCom interconnection agreements to resolve this since it has likely been subject to extensive negotiation between the parties. Staff did not believe that there was any need to "reinvent the wheel" when the major CLECs and Qwest have already negotiated such provisions within their existing interconnection agreements.

592. In its Comments on Staff's Proposed Findings of Fact and Conclusions of Law, AT&T states that it is not sure what section of its interconnection agreement with Qwest Staff is referring to. AT&T Comments at p. 5. AT&T further states that Section 19 of its Agreement contains the provisions on limitations of liability. Id. Although portions of Section 19 were agreed upon by AT&T and Qwest, the portion in Section

[209] *See generally* Ex. 6-Qwest-82 (Brotherson WA Reb.) at 46-53.
[210] *See* Ex. 6-Qwest-82 (Brotherson WA Reb.) at 48.

19.3 on patterns of conduct was ordered by the Administrative Law Judge at the request of AT&T. Id. AT&T agrees with the Judge's decision. Id. AT&T requests that Staff review section 19 of AT&T's interconnection agreement to confirm that Section 19 in its entirety should be included. AT&T Comments at p. 6.

593. In its Comments on Staff's Proposed Findings of Fact and Conclusions of Law, Qwest states that Section 5,8 addresses the issue of the proper scope and purpose of limitations on the parties' liability to each other. Qwest Comments at p. 18. Qwest states that in response to CLEC comments and suggestions in this and other proceedings, Qwest substantially revised its proposed limitation of liability provisions set forth in Section 5.8. This resulted in a significant narrowing of the issues, according to Qwest. Id. Qwest states that Staff's recommendation is inappropriate since no party suggested that the limitation of liability provisions contained in Qwest's interconnection agreements with AT&T and WorldCom be incorporated into the SGAT. Id.

594. Qwest states that the issues remaining in dispute relating to limitations on liability stem from a fundamental disagreement between Qwest and AT&T about the proper scope and purpose of the limitation section. Id. Qwest argues that Section 5.8 aims at limiting the parties' potential liability to each other and to third parties in a way that is both consistent with established industry practice and comports with existing state law. Qwest states that its proposals adequately accommodate payments made under the QPAP entered into between the parties without unnecessarily confusing the purposes of these provisions and any remedial scheme adopted by the state commissions in connection with Qwest's 271 approval. Id. The provisions are as follows:

> 5.8.1 Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed. Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises. Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT Section.
>
> 5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including

(without limitation) negligence of any kind and regardless of whether the parties know the possibility that such damages could result. If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan.

5.8.3 Intentionally Left Blank.

5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for willful misconduct.

5.8.5 Nothing contained in this Section 5.8 shall limit either Party's obligations of indemnification specified in this Agreement, nor shall this Section 5.8 limit a Party's liability for failing to make any payment due under this Agreement.

5.8.6 Intentionally Left Blank.

595. Qwest argues that courts and commissions have long recognized the need for such limits in the context of regulated industries for a number of reasons. Qwest Comments at p. 21. First, Qwest states that commissions have indicated that it is in the public interest to limit liability of regulated industries such as public utilities in order to ensure public access to utility services at affordable rates. Id. Without such limitations of liability, costs associated with the potential risk of lawsuits would otherwise be passed on to captive ratepayers thus raising rates and limiting wider public access of utility services. Id. Qwest argues that another justification for limiting liability of public utilities is the highly regulated nature of the industry itself. Qwest Comments at p. 22. Qwest argues that when parties are unable to freely negotiate an agreeable level of liability risk and factor such risk into the offering price, contractual limitations such as those proposed by Qwest are required. Id. Qwest claims that Section 5.8.1 captures the traditional tariff limitation that limits liability to the cost of services that were not rendered or were improperly rendered to the end user. Qwest Comments at p. 23. Qwest states that AT&T does not challenge the fact that this limitation reflects longstanding industry practice, including its own contractual arrangements with its customers. Id.

596. In response to AT&T's concern regarding the QPAP, Qwest states that it added the following language to section 5.8.2: "If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan."

597. Qwest further states that AT&T has proposed several revisions to section 5.8.4 which provides an exception to the limitation of liability for willful misconduct which Qwest claims are misguided and should be rejected. AT&T Comments at p. 24. In response to AT&T's suggestion that the exception for willful misconduct be expanded

to include gross negligence and bodily injury, death or damage to tangible real or tangible personal property caused by such Party's negligent act or omission or that of their [sic] respective agents, subcontractors or employees, Qwest claims that it reflects a misunderstanding of the purpose of the limitation provision in general and the willful misconduct exception in particular. Id. Qwest states that AT&T has not challenged Qwest's argument that the inclusion of "gross negligence" would be inconsistent with established practice in the industry. Qwest Comments at p. 25. Qwest has agreed to adoption of the multi-state facilitator's additional language for Section 5.8.4: "Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors or employees."

598. Following the submission of briefs on Impasse Issue No. 9, Qwest states that the parties agreed to delete Section 5.8.6 as moot in light of Qwest's agreement in Section 11.34 to make available to CLECs fraud prevention or revenue protection features. Qwest Comments at p. 25.

599. Finally, Qwest claims that the Nebraska, New Mexico and Montana Commissions have adopted the language Qwest proposes. The Colorado Commissioner also substantially embraced the position advocated by Qwest, according to Qwest. Qwest Comments at p. 26.

600. Upon reconsideration, Staff recommends adoption of the language proposed by Qwest along with the changes made by the multistate facilitator.

DISPUTED ISSUE NO. 10 : Should AT&T's proposed restrictions on Qwest's sale of exchanges in the Assignment Clause be adopted? (G-38, SGAT Section 5.12)

a. Summary of Qwest and CLEC Positions

601. AT&T proposes in a new Section, 5.12.2, that the interconnection agreement, for new exchanges, which Qwest sells, be assigned (to the purchaser) for the entire term of the agreement and that Qwest require the purchaser to agree to this condition. WorldCom states that this condition provides certainty and stability to the CLEC Community, and would support the purpose of the Act to encourage local competition in all markets. CLECs further state that failure to continue the agreement for its full term could cause financial harm, since a new agreement could make it more expensive for CLECs to interconnect with ex-Qwest exchanges.

602. AT&T states that the current status of this particular SGAT section is unclear. However, AT&T believes that the parties are at impasse insofar as Qwest's sale of exchanges has an impact upon Qwest's contract or SGAT obligations with CLECs. AT&T's states that their proposal ensures that carriers work together for a smooth transition and that Qwest treat its wholesale customers as though it was concerned about performing under their contracts as well.

603. Qwest sees CLEC's (AT&T's) position as one which gives CLECs unusual control of Qwest's business decisions for the sale of exchanges. It further sees this position as one placing undue restrictions on the buyer.

604. Qwest considers the following AT&T conditions to be unreasonable: (1) obtain for the CLEC a "written agreement" from the party to which the exchange is to be transferred "in a form and substance reasonably satisfactory to [the CLEC]" that the purchasing party "agrees to be bound by the interconnection and intercarrier compensation obligations set forth in [the SGAT]" until and interconnection agreement between the CLEC and the party becomes effective; (2) "serve" the CLEC with a copy of "any Transfer application or other related regulatory documents associated with the transfer; and (3) not oppose the CLEC's intervention in any regulatory proceeding relating to the transfer.[211]

b. Discussion and Staff Recommendation

605. In that Qwest's sale of 38 rural wire centers to Citizens has been cancelled, Staff, in its Proposed Findings of Fact and Conclusions of Law, believed this issue was now moot and that Qwest should simply delete this provision from its SGAT.

606. In their Comments to Staff's Proposed Findings of Fact and Conclusions of Law, AT&T disagreed with Staff's finding that the issue regarding the sale of exchanges and the effect in any interconnection agreements is now moot. Comments at p. 6. AT&T states that the Citizens sale highlighted the need for the SGAT provisions. AT&T further states that cancellation of the sale did not eliminate the need for certainty on the part of the CLECs. Id. If an exchange where a CLEC is doing business is sold by Qwest, the CLEC is now at the mercy of the purchaser of the exchange. Id. AT&T further states that at that point the CLEC will have customers and no interconnection agreement with the purchaser. Id. AT&T also states that the purchaser is given an undue advantage in negotiations, and the legal obligations of the purchaser during the period from the date of the purchase to the approval of an interconnection agreement is unclear. Id. AT&T states that CLECs should have some certainty that the new purchaser will abide by existing legal obligations of Qwest that are related to the exchanges. Id. For example, the purchaser has to abide by existing right-of-way obligations made by Qwest or lose the right-of-way. Id. The obligations contained in the interconnection agreements can be factored in the sales price, as are other obligations imposed on the purchaser through any sale. Id.

607 In its Comments to Staff's Proposed Findings of Fact and Conclusions of Law, WorldCom states that the concept of requiring that the interconnection agreement, for new exchanges, which Qwest sells, be assigned to the purchaser for the entire term of the agreement and that Qwest require the purchaser to agree to this condition is still necessary. WorldCom Comments at p. 4. WorldCom, like AT&T, states that such a provision provides certainty and stability to the CLEC community, and will support the purpose of the Federal Act to encourage local competition in all markets. Id. WorldCom

[211] *See* Ex. 6-Qwest-82 (Hydock WA Aff.) at 48-49 (setting forth proposed § 5.12.2(a), (d), and (e)).

also argues that because of the different obligations under the Act for RTCs, this issue relevant. Id. If an RTC does not accept or Qwest is not obligated to assign its interconnection agreements with CLECs, then CLEC rights are abridged. Id.

608. Upon reconsideration, Staff agrees with the CLECs. Staff recommends that Qwest be required to include a provision in its SGAT which requires that the interconnection agreement for any exchanges which Qwest sells be assigned to the purchaser for the entire term of the agreement and that Qwest include such condition in its sales agreements with any future purchaser of its exchanges.

DISPUTED ISSUE NO. 11 : What is the appropriate scope of audits? (G-51 - SGAT Section 18)

a. Summary of Qwest and CLEC Positions

609. CLECs contend that an audit is an inquiry into specific elements or processes related to services provided by Qwest. CLECs further argue that there already are provisions in interconnection agreements for comprehensive reviews of service. CLECs believe the audit authority should be expanded to include the right to examine services performed under the agreement (*e.g.*, confirm that Qwest is maintaining CLEC forecasts in the manner prescribed by the law). They argue that such audit authority is routinely granted under technology contracts where parties exchange intellectual property which applies here.

610. WorldCom also supported broader audit authority and pointed out that such authority is standard in interconnection agreements it has with Qwest.[212]

611. Qwest's position is that a CLEC requested audit is intended to review billing information exchanged by the parties, including books, records and other documents used in the process of billing for services performed. Further, Qwest states that the PAP provides an intrinsic audit-type function. In addition, CLECs may request two "mini-audits" per year for two performance measures, within the PAP process. Finally, Qwest states that if the parties have concerns for the quality of service or Qwest's performance, the appropriate forum is the dispute resolution process. The SGAT already contains several, more appropriate mechanisms to insure Qwest's performance, and examinations are not the proper method to address performance related issues.

612. The SGAT contains a detailed and comprehensive dispute resolution process. If AT&T believes that Qwest failed to perform as required by the SGAT, AT&T can initiate dispute resolution proceedings pursuant to section 5.18.

613. Second, the scope of the examination should not be expanded beyond billing issues. To do so would enable CLECs to harass and overly burden Qwest.

[212] 7/10/01 WA Tr. at p. 4123.

b. **Discussion and Staff Recommendation**

614. In its Proposed Findings of Fact and Conclusions of Law, Staff concurred with Qwest that aspects of the CLEC proposed audits are too broad and that there are other mechanisms available both within and external to the SGAT to ensure compliance. For instance there are several venues currently available for assessing Qwest's performance including the dispute resolution process. In addition, the required performance audits as well as the biennial audit will be broader and conducted by objective third parties.

615. Staff agreed, however, with the multi-state facilitator that there is a need for new SGAT language to address proprietary information use. Therefore, in its Proposed Findings Staff recommended adoption of the following proposed by the multi-state facilitator:

> Either party may request an audit of the other's compliance with this SGAT's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting party ha provided to the other. Those audits shall not take place more frequently than once in every three years, unless cause is shown to support a specifically requested audit that would other wise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits , the party to be audited may also request the use of an independent auditor.

616. In its Comments to Staff's Proposed Findings of Fact and Conclusions of Law, AT&T states that the performance audits and biennial review have not been shown by Staff to address the CLECs' concerns regarding the right of CLECs to examine whether Qwest is performing its obligations under the agreement. AT&T Comments at p. 7. AT&T also states that Staff's proposed language is internally inconsistent. Id. AT&T states that n the one hand it permits a compliance audit while on the other hand, it prohibits investigations or testing for compliance. Id.

617. In its Comments to Staff's Proposed Findings of Fact and Conclusions of Law, WorldCom states that CLECs believe the audit authority should be expanded to include the right to examine services performed under the agreement (e.g., confirm that Qwest is maintaining CLEC forecasts in the manner prescribed by the law). WorldCom Comments at p. 5. WorldCom finds little comfort with Qwest's argument that the SGAT contains a detailed and comprehensive dispute resolution process and that if CLECs believe that Qwest failed to perform as required by the SGAT, a CLEC can initiate dispute resolution proceeding pursuant to Section 5.18. WorldCom Comments at pps. 5-6. WorldCom requests that a third sentence be added to Section 5.18.1 which reads as

follows: "Nothing in this Section 18 shall preclude the right of any party to examine service performed under this Agreement and address any alleged deficiencies of Qwest's performance of those services under Section 5.18 concerning dispute resolution proceedings, or under all other remedies available in law or in equity." WorldCom Comments at p. 6. WorldCom claims that this sentence incorporates what Qwest and Staff assert are the CLEC's existing rights under the SGAT. Id.

618. Upon reconsideration, Staff does not object to the additional language proposed by WorldCom and recommends its adoption, with slight modification. Therefore, Qwest shall be required to add the following sentence to Section 5.18.1: "Nothing in Section 18 shall preclude the right of any party to examine service performed under this agreement and address any alleged deficiencies of Qwest's performance of those services before the Commission, or under Section 5.18 concerning dispute resolution proceedings, or under all other remedies available in law or in equity."

DISPUTED ISSUE NO. 12 : Whether Qwest's proposed definition of "Legitimately Related" is sufficient? (G-27, SGAT Section 4)

a. Summary of Qwest and CLEC Positions

619. CLECs argue that Qwest "exaggerates and abuses" the use of the "legitimately related" environment. AT&T argues that Qwest provided nothing in the way of evidence to suggest that Qwest's exercise of the "legitimately related" requirement is anything other than a purely subjective and arbitrary decision.

620. Qwest states that the definition should encompass rates, terms and conditions that, when taken together, are those necessary to establish a business relationship (e.g. as to a particular interconnection service element). This excludes "general terms and conditions". CLECs state that there is no explicit definition in the FCC's rules, but they would be willing to use interpretations by the FCC in specific contexts. Thus, they hold the position that the term should be applied on a case by case basis.

b. Discussion and Staff Recommendation

621. As discussed above, Staff believes that Qwest's definition of "legitimately related" is reasonable. The definition proposed by Qwest together with other SGAT revisions proposed by Qwest related to this issue, sufficiently limit the terms and conditions which may be applied by Qwest.

DISPUTED ISSUE NO. 13 : What should be the term of the agreement? (G-30, SGAT Sections 5.2.1 and 5.2.2)

a. Summary of Qwest and CLEC Positions

622. Qwest originally proposed a three-year term but after a dispute over section 5.2.2. language, Qwest returned to its original position of two years. Subsequent agreement was reached on 5.2.2 and WorldCom considers the issue closed with the three-year term being retained in SGAT 5.2.1.

623. Neither Qwest nor AT&T briefed this issue.

b. Discussion and Staff Recommendation

624. Qwest originally proposed a three-year term, but withdrew it in Colorado during the workshop, over a language dispute. Subsequently Qwest, AT&T and WorldCom agreed on a modified version of SGAT 5.2.2.

625. With the language for SGAT Section 5.2.2. agreed upon, WorldCom opined that the three-year term would also be retained in SGAT Section 5.2.1.

626. In its Proposed Findings of Fact and Conclusions of Law, since Qwest did not brief this issue, Staff concluded that the three-year term of the Agreement had been retained, subject to the condition that Qwest must obtain Commission approval at the end of the three-year period to withdraw its SGAT. Staff recommends in addition the following conditions. The SGAT shall continue in force and effect at the end of the three-year period until an order is entered by the Arizona Commission approving its withdrawal, if the Commission finds that withdrawal or termination of the SGAT is in the public interest. Staff recommends that Qwest include language in its SGAT which contains these conditions to the SGAT withdrawal.

DISPUTED ISSUE NO. 14 : Whether Qwest's SGAT has adequate revenue protection language. (G-50(D): SGAT Section 11.34)

a. Summary of Qwest and CLEC Positions

627. WorldCom's position is that they consider this issue closed and that if the language agreed upon by the parties is approved, WorldCom would withdraw its request that its language found in MWS-1 of the direct testimony of Michael W. Schneider[213] be included in section 11.34.

b. Discussion and Staff Recommendation

[213] See, Direct Testimony of Michael W. Schneider, Arizona Exhibit 6 Qwest-1, MWS-1at page 45, WorldCom's Section 20.2 language entitled "Revenue Protection".

628. After the Colorado workshops, Qwest, AT&T, Sprint and WorldCom agreed that language concerning revenue protection should be added to the SGAT. This language appears on page 15 of WorldCom's September 18, 2001 brief addressing General Terms and Conditions and Public Interest Impasse Issues. It is listed as Section X, and Sub-Sections X.1 through X.5. Since Qwest and AT&T did not brief this issue, Staff considered this issue to be closed.

629. In its Comments on Staff's Proposed Findings of Fact and Conclusions of Law, WorldCom states that in Colorado, Qwest and the CLECs agreed to the following language for Section 11.34:

> 11.34 Revenue Protection. Qwest shall make available to CLEC all present and future fraud prevention or revenue protection features. These features include, but are not limited to, screening codes, information digits '29' and '70' which indicate prison and COCOT pay phone originating line types respectively; call blocking of domestic, international, 800, 888, 900, NPA-976, 700 and 500 numbers. Qwest shall additionally provide partitioned access to fraud prevention, detection and control functionality within Operations Support Systems which include but are not limited to LIDB Fraud monitoring systems
>
> 11.34.1 Uncollectible or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the Party causing such error or malicious acts, if such malicious acts could have reasonably been avoided.
>
> 11.34.2 Incollectible or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their subtending Operational Support Systems by unauthorized third parties that could have reasonably been avoided shall be the responsibility of the Party having administrative control of access to said Network Element or operational support system.
>
> 11.34.3 Qwest shall be responsible for any direct uncollectible or unbillable revenues resulting from the unauthorized physical attachment to Loop facilities from the Main Distribution Frame up to and including the Network Interface Device, including clip-on fraud, if Qwest could have reasonably prevented such fraud.

11.34.4 To the extent that incremental costs are directly attributable to a revenue protection capability requested by CLEC, those costs will be borne by CLEC.

11.34.5 To the extent that either Party is liable to any toll provider for fraud and to the extent that either Party could have reasonably prevented such fraud, the Party who could have reasonably prevented such fraud must indemnify the other for any fraud due to compromise of its network (e.g., clip-on, missing information digits, missing toll restriction, etc.).

11.34.6 If Qwest becomes aware of potential fraud with to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.

630. WorldCom requests that Qwest include the above consensus language in its updated SGAT. Staff recommends that Qwest include the above consensus language in its updated SGAT.

DISPUTED ISSUE NO. 15 : Use of confidential information. (G-62, SGAT Section 5.16)

a. Summary of Qwest and CLEC Positions

631. The parties' positions on this issue are covered in the same briefs as Disputed Issue No. 2.

b. Discussion and Staff Recommendation

632. This issue is the same as Impasse Issue G-8, although much broader than forecast information only. It remains an impasse issue in Colorado. However, to the best of Staff's knowledge, it has been closed in Arizona. Nonetheless, Staff stated in its Proposed Findings of Fact and Conclusions of Law, Qwest should be required to add language to its SGAT concerning the treatment of confidential information in general.

633. In response to Staff's Proposed Findings of Fact and Conclusions of Law, Qwest states that because no language disputes remain with Qwest's agreement to incorporate Staff's recommendation concerning Disputed Issue No. 2, Qwest agrees with Staff that Disputed Issue No. 15 is closed. Qwest Comments at p. 17.

634. In response to Staff's Proposed Findings of Fact and Conclusions of Law, WorldCom requests that Qwest be required to add language to its SGAT which the parties agreed to in Colorado:

> 5.16.3 Each Party shall keep all of the other Party's Proprietary Information confidential and will disclose it on a need to know basis only. In no case shall retail marketing, sales personnel, or strategic planning have access to such Proprietary Information. The Parties shall use the other Party's Proprietary Information only in connection with this Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing. If either Party loses, or makes an unauthorized disclosure of, the other Party's Proprietary Information, it will notify such other Party immediately and use reasonable efforts to retrieve the information.

635. If the above language is included in Qwest's updated SGAT, WorldCom believes Staff's concerns will have been addressed. Staff believes that the language proposed by WorldCom is reasonable and should be included by Qwest in its SGAT.

III. CONCLUSIONS OF LAW

1. 47 U.S.C. § 271 contains the general terms and conditions for BOC entry into the interLATA market.

2. Qwest is a public service corporation within the meaning of Article XV of the ARIZONA Constitution and A.R.S. §§ 40-281 and 40-282, and the Arizona Corporation Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company ("BOC") as defined in 47 U.S.C. § 153, and currently may only provide interLATA services originating in any of its in-region states (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. § 271(d)(3).

4. The Arizona Corporation Commission is a "State Commission" as that term is defined in 47 U.S.C. § 153(41).

5. Pursuant to 47 U.S.C. § 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State Commission of any State that is the subject of the application in order to verify the compliance of the Bell Operating Company with the requirements of subsection (c).

6. In order to obtain § 271 authorization, Qwest must, inter alia, meet the requirements of the Section 271 competitive checklist.

7. In order to implement its checklist requirements, Qwest has proposed its Statement of Generally Available Terms and Conditions ("SGAT"), which includes General Terms and Conditions, a Bona Fide Request ("BFR") and Special Request Process ("SRP"). Compliance with the Competitive Checklist requires a finding that the General Terms and Conditions, BFR and SRP components of the SGAT are in compliance with the requirements of the Competitive Checklist.

8. As a result of the proceedings and record herein, and subject to Qwest modifying its SGAT language consistent with the resolution of the impasse issues contained above, Qwest meets the requirements of the Competitive Checklist, by providing SGAT General Terms and Conditions that are consistent with Section 251 of the Federal Act.